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VOL. 18.

CASES AT LAW

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

FROM DECEMBER TERM, 1834, TO JUNE TERM, 1836,
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1834.

WILLIAM CASEY et al. v. HENRY GILES.

An action of debt may be maintained upon an injunction bond, notwithstanding the summary remedy given by the Acts of 1785 (Rev., ch. 233, sec. 2), and 1810 (Rev., ch. 794).

THIS was an action of DEBT in which the plaintiff declared upon an injunction bond drawn according to the Act of 1800 (Rev., ch. 551). The execution of the bond was admitted, as was the fact that the injunction had been dissolved before this action was brought. His Honor, *Judge Seawell,* at ROWAN, on the last circuit, being of opinion that the action could not be maintained, but that the only remedy was by motion, as directed by the Acts of 1785 (Rev., ch. 233, sec. 2) and 1810 (Rev., ch. 794), the plaintiff submitted to a nonsuit and appealed.

Pearson, for the plaintiff.
Winston, contra.

RUFFIN, C. J. Whether the bond be regarded as an obligation *in pais* or of record, debt is the appropriate remedy at common law. That action is not expressly abolished by the acts which give the summary remedy; nor, we think, by any reasonable inference. Judgments on notice and motion are given on many official bonds, as those of (2) sheriffs and clerks; but that method has never been considered as excluding the old actions. The statutes have not in view the benefit of the debtors, when a summary pro-

ceeding is authorized against them; but it is given in aid of the creditor, and as suppletory to his remedy at common law. Hence, the creditor has an election, unless, as in the case of bail, he should by proceeding in a particular way deprive the other party of a defense which the law designed for him at all events. The creditor may reasonably prefer bringing the action of debt, because he therein gets bail, which, in some instances, may be a better security than even a judgment *instanter* against the party himself; and the Legislature did not intend to deprive the creditor of any advantage. For these reasons the Court is of opinion that the Superior Court erred, and the judgment must therefore be reversed, and a *venire de novo* ordered.

PER CURIAM. Judgment reversed.

DEN ex dem. of ROBERT H. BURTON et al. v. JOHN CARRUTH.

The cutting grass in a meadow for seven years successively, stacking it on the land and fencing the stack will, with color of title, bar the entry of one claiming adversely.

EJECTMENT, tried before his Honor, *Judge Martin,* at LINCOLN, on the last circuit. On the trial it appeared that the land in dispute was patented in the year 1768 by Gillespie. Sloan conveyed the same land to Robert Wear, in the year 1798, and Wear to the lessors of the plaintiff, in the year 1826. To show that Gillespie, or his heirs, had lost their right of entry, and that the title to the land was completely vested in Wear, by the Act of 1715 (Rev., ch. 2), the lessors of the plaintiff proved that the grass of a meadow on the premises was mowed each successive year, for seven years, by Wear, or by persons authorized by him, and stacked on the ground, with a fence around the stacks. The question was, whether this was such a possession as, with his colorable title, gave Wear a good and valid title. The Judge instructed the jury that it was. A verdict was rendered for the plaintiff, and the defendant appealed.

(3)

No counsel appeared for the defendant.

Nash, for the plaintiff.

DANIEL, J., after stating the case as above, proceeded: We are of opinion that the instruction given by the Judge was correct. The seven years continued perception of the profits of the land, by Wear under his deed, by cutting the grass off the meadow and stacking it on the land and fencing the stacks, was a possession under circumstances sufficiently capable in their nature of notifying all persons that he was upon the land claiming it as his own. *Andrews v. Mulford,* 2 N. C., 320; *Grant v. Winborne,* 3 N. C., 56. The claim, or entry, of Gillespie, or his heirs, or any person claiming under him, was, by the Act of 1715 (Rev., ch. 2, sec. 4), perpetually barred; and the title became perfect and complete in Wear, so as to enable him to convey to the lessors of the plaintiff.

PER CURIAM. Judgment affirmed.

Cited: Treadwell v. Reddick, 23 N. C., 58; *Loftin v. Cobb,* 46 N. C., 409.

RANSOM M. SHEARIN v. THOMAS R. NEVILLE, admr.

If it appears upon the whole record that the demand of the plaintiff is against the defendant in his representative character, a judgment against him personally will be reversed.

THIS was an action commenced originally by warrant before a single magistrate, and carried by successive appeals to the Superior Court, where it was tried on the last Spring Circuit, before *Settle, J.* The facts sufficiently appear in the opinion of the Court.

Badger, for defendant.
Devereux, contra.

GASTON, J. We have had some difficulty in understanding the record in this case, and are by no means confident that the exposition, which we have found ourselves constrained to put upon it, does not conflict with the intention of the parties to the controversy. Should it be so, (4) it may be proper to remark that the recurrence of similar inconveniences hereafter can only be prevented by coun-

sel taking care to have entered of record whatever amendments may be made in the pleadings below. Our attention is confined to the transcript sent up, and we are obliged to render thereon such judgment as it appears to us ought to have been rendered in the court from which the appeal is taken. This transcript shows that the plaintiff commenced his action by a warrant before a justice, summoning the defendant as administrator of Thomas Neville, Jr., to answer the plaintiff in an action of debt, due by account to the amount of sixty dollars. A judgment having been rendered on this warrant in favor of the plaintiff, the defendant appealed therefrom to the County and afterwards to the Superior Court. To the plaintiff's action, after it came into court, the defendant put in a memorandum of the pleas of *general issue*, *payment*, *set-off* and the *statute of limitations*, but made no defense because of a deficiency of assets. The case drawn up by the Judge who tried the cause in the Superior Court, which case forms a part of the transcript, states that the action tried was *assumpsit*. We feel ourselves, therefore, bound to understand that either by consent or by leave of the Court, the form of the action was thus far altered, but there is nothing from which we can see that it was also changed from an action against the defendant in his representative character to one against him personally. The jury found a verdict for the plaintiff on all the issues, and assessed his damages as in *assumpsit* to forty-six dollars, of which forty dollars was principal money, subject to the opinion of the Court upon a case stated. This case shows a verbal contract of a lease for a year between the plaintiff and the defendant's intestate, with an agreement that the plaintiff by way of collateral security might hold on the crop until the rent was paid—and that the plaintiff after the death of the defendant's intestate relinquished this collateral security, and agreed with the defendant to assert his right to this demand by suit. The Court upon this verdict gave a judgment for the plaintiff,
which was entered up upon the record against the de- (5)
fendant personally, and thereupon the defendant appealed.

From this analysis of the record it appears that there is error in the judgment, because it is rendered against the defendant *de bonis propriis*, upon a demand wherein he is

sued in his representative character, and for this error it must be reversed with costs to the appellant in this Court. And proceeding then to render such a judgment as on the whole record, it appears to us, ought to have been entered in the Court below, we shall give the plaintiff a judgment for his forty-six dollars damages, with interest on forty dollars from the time of the judgment below, and his costs before the appeal, to be levied of the goods of the intestate in the hands of the defendant, if he have so much thereof to be administered, and if not, then the costs to be levied of the defendant's own property.

PER CURIAM. Judgment accordingly.

Cited: Hare v. Parham, 49 N. C., 414.

DEN ex dem. ELIZABETH DOBBINS v. IVERSON G. STEPHENS.

Ejectment may be sustained, although it appears that the lessor of the plaintiff and the defendant, are both living on different parts of the tract of land in dispute, claiming adversely to each other.

The doctrine of possession, as connected with the actions of trespass and ejectment, discussed by RUFFIN, C. J.

EJECTMENT. On the trial at CASWELL on the last Fall Circuit, it appeared in evidence that at the commencement of the action, and continually up to the time of the trial, both the lessor of the plaintiff and the defendant were in possession, living in different houses on the lands in dispute, claiming adversely under their respective titles. His Honor, *Judge Seawell,* considering the action as possessory, and the ouster stated and admitted in the pleadings as only fictitious for the purpose of trying the right under which the plaintiff claimed, held that, as the plaintiff was in possession, living on the land, though it was competent for him to maintain trespass against an invasion of his possession by one having no title, yet that he could not bring ejectment to recover a possession, which he then had, and which he had never (6) lost. The plaintiff in submission to this opinion suffered a nonsuit, and appealed.

Winston and *J. W. Norwood,* for the plaintiff.
W. A. Graham, for the defendant.

RUFFIN, C. J. It has been contended for the plaintiff that the action can be maintained upon the strength of the consent rule alone, as that confesses the ouster, and the defendant cannot afterwards deny it. Perhaps that may be correct; but a resort to it is not necessary in this case, as the Court entertains a decided opinion that the facts as proved, without the aid of those supposed in the record, do fully support the action.

The argument against it is that the lessor of the plaintiff, who affirms that he has the title, and is in his possession of part, with a claim of the whole, might bring trespass against the defendant, and, therefore, must be legally regarded as in possession of the whole, and cannot bring ejectment. It is true that entry is one of the common-law remedies of the owner whereby he converts a disseizor or intruder into a trespasser. Hence, such an entry, accompanied with such acts of ownership, over a part even, in the name of the whole, as shows the purpose of taking a full possession, and treating the wrong-doer as a mere trespasser, may be held to be sufficient to support the action of trespass. But if it be so, it can only be upon the ground of the anxiety of the law to support right, and to advance all or any of the remedies for an acknowledged wrong. To allow the owner to elect to have the actual possession of the whole is rather excused by that anxiety than justified by the exact truth. The case states that these parties are in possession of different parts of the tract of land, each claiming the whole adversely under distinct titles. It does not appear which had the prior possession, nor how long each had his possession before the commencement of the suit. It perhaps would make no difference whether the lessor of the plaintiff entered on the defendant, or the contrary. For there is nothing incongruous in the supposition that the owner may be disseized of a parcel of his estate or may enter
(7) into a parcel and not the whole. Concurrent adverse actual possessions are not easily conceived. When, after the entry of the owner, he brings trespass against the tortious possessor for continuing his possession, it is upon

the idea that the entry was intended as the resumption of the exclusive possession. But if the entry be only into a parcel, as such, the possession acquired thereby is necessarily restricted to that parcel; and by bringing ejectment, instead of trespass, the owner disavows the possession of the whole. This is exemplified in the common rules respecting possession and the operation of the statute of limitations, when deeds lap, as it is called. If neither claimant be in actual possession of the land covered by both deeds, the seizin is in the owner; but if one of them be seated on that part and the other not, then the possession of the whole interference is in the former. But if both have actual possessions on it, the possession of the whole is in neither; that of the owner extending by virtue of his title to all not actually occupied by the other; and that of the latter being limited to his actual occupation. So the rules have been long understood, as expressed in *Green v. Harman,* 15 N. C., 158. It cannot be admitted that the owner is restricted to the use of physical force to protect his possession or remove the person who thus disturbs it. That remedy is tolerated, but not encouraged. The law must have means of its own for removing by process a wrongful possessor and quieting a rightful one. To call that process into activity, the owner who has been ousted of a parcel of a tract of land is surely not obliged to abandon his residence on another part of the land so as to put himself entirely out of possession, although he may claim the whole as one entire tract according to his title papers. On the contrary, the opinion of the Court is clear that where the land is capable of severance into parcels, and a wrong-doer actually occupies one of them, the truth of the case forbids him, when a defendant in ejectment, to deny that he is in possession, or that he has ousted the other party from the parcels of which he is himself thus possessed. Such a denial would itself be a fiction, and to allow it would be to set it up to work a wrong, instead of advancing a remedy by it. Here there are two different (8) and distinct dwelling-houses, and each is occupied severally by the respective parties, of whom each claims to have a right to the whole, though not to hold the whole. Here are, therefore, in fact, separate parcels; and the doubt is, whether the lessor of the plaintiff, if the owner, could have trespass, without re-entry into the part in the occupation of the de-

fendant. That it does not lie in the mouth of the latter, after he has actually entered into a part upon an adverse claim of right to the exclusive possession, to say that he did not intend to usurp the exclusive possession, and has not usurped it—in other words, that he has not ousted the owner—we have no doubt. As far as he has acquired a possession, it is not competent for him to deny that it has been lost on the other side. We suppose that there can be no doubt that the declaration may be for the whole tract, and yet a recovery be had for any part which the defendant possesses in severalty, or for any undivided aliquot part. The Court, therefore, deems the opinion delivered in the Superior Court erroneous, and must reverse the judgment and send the cause to another trial.

PER CURIAM. Judgment reversed.

Cited: Carson v. Burnett, post, 553; *Williams v. Miller,* 29 N. C., 188; *Scott v. Elkins,* 83 N. C., 427; *McLean v. Smith,* 106 N. C., 176.

RUSSELL SUGART v. EDWARD CARTER.

In an action of slander, where the words contain an imputation of murder the plaintiff may be entitled to recover, although the defendant may prove that the person alleged to be dead is still alive, if those in whose presence the words were spoken had well-grounded reasons to believe that he was then dead.

ACTION of SLANDER, for charging the plaintiff with having killed a certain man by the name of Jones. On the trial at SURRY, on the last Spring Circuit, before his Honor, *Judge Seawell*, the plaintiff having proved the words, the defendant attempted to prove that Jones, the person spoken of, was still alive. His Honor charged the jury that unless the proof satisfied them that the man was still alive, they ought to find for the plaintiff; and further, that even if they believed the man to be alive, yet, if the charge was made under such
(9) circumstances as afforded a well-grounded belief that he was dead, and the by-standers in whose presence the charge was made did not in fact know that he was alive, they ought still to find for the plaintiff. A verdict being returned for the defendant, the plaintiff appealed.

No counsel appeared for the plaintiff.
Nash, for the defendant.

DANIEL, J. The Judge charged the jury, first, that unless the evidence satisfied them that the man charged to have been killed by the plaintiff was alive, they ought to find for the plaintiff; secondly, that if they believed the man to be alive, yet, if the charge was made under such circumstances as afforded a well-grounded belief that he was dead, and that the by-standers did not know that he was alive, still they ought to find for the plaintiff.

We think that the plaintiff has no right to complain of the charge. If the jury found their verdict contrary to the evidence, and the Judge refused to grant a new trial, this Court has no jurisdiction to interfere on that ground. In *Talbot v. Case* (Cro. Eliz., 823) it was said that the death of the person alleged to have been murdered would be intended, unless the contrary appeared. Starkie on Slander, 71, says it cannot fairly be inferred that the plaintiff is in all cases precluded from recovering, although the person alleged to have been murdered should be still alive, since the plaintiff's life may have been placed in jeopardy in consequence of the injurious report, though in fact, at the time of pleading, or upon the trial, the defendant may be able to prove the person alleged to have been murdered, to be still living. The words, if actionable without special damage, must be so immediately when spoken; and their actionable quality must then depend upon the fact whether the hearers were aware that the person alleged to be murdered was really alive; if they did not know the fact, then all the consequences (the probability of which renders a charge of murder in any case actionable) may follow, since, unfortunately, several melancholy instances may be cited, where an accused person has (10) suffered for the supposed murder of one who survived him. The foregoing reasoning appears to us to be sound; and the plaintiff had the benefit of it. We see no error in the charge, and therefore must affirm the judgment.

PER CURIAM. Judgment affirmed.

Cited: Chambers v. White, 47 N. C., 384.
Dist.: Mebane v. Sellers, 48 N. C., 201.

JOHN BLUNT et ux. v. DAVID MOORE.

Upon an appeal from an order of the County Court granting letters of administration, the Superior Court acquires general jurisdiction of the matter, and may grant letters to one not originally a party to the contest.

THIS was a contest for administration on the estate of David Moore, deceased. The wife of the plaintiff, John Blunt, was a daughter and the defendant a son of the deceased. In the County Court, upon the respective applications of the defendant and John Blunt, the administration was committed to Blunt, and the defendant appealed to the Superior Court. In that Court, the case coming on to be heard at MECKLENBURG, on the last circuit, before his Honor, *Judge Martin,* it was ordered, upon an application in behalf of Hannah, the wife of the plaintiff, that administration on the estate of the deceased be granted to her, whereupon the defendant appealed.

Devereux, for the defendant.
Badger, contra.

DANIEL, J. The question in this case is whether the Superior Court had the power, under the circumstances, of hearing the application in behalf of Hannah, the wife of Blunt, to obtain letters of administration on the personal estate of her deceased father.

By the Act of 1792 (Rev., ch. 364) the greatest creditor residing within the State shall be entitled, after the widow and next of kin, to administration on the estate of any deceased person. Of the persons whose preferable right to administer is thus recognized, the widow, if any, in this case does not claim; and Mrs. Blunt and the defendant are brother and sister, and in equal degree. By the Act of 1777 (Rev.,
(11) ch. 115, secs. 57 and 58) it is enacted that the Courts of Pleas and Quarter Sessions shall and may within their respective counties, make orders for issuing letters of administration; that any person who shall claim a right to administer the estate of any intestate, and shall think himself injured by order of Court for administration, shall be entitled to an appeal to the Superior Court; and such Supe-

rior Court shall determine the same, and upon such determination had, such Court shall proceed to grant letters to the persons entitled to the same, he or she giving bond with sufficient security for the faithful discharge of the trust. Whilst the proceedings were in contestation between Moore and Blunt in the Court of Pleas and Quarter Sessions, Hannah, the daughter of the intestate, might unquestionably have intervened and put in her claim. The appeal had the effect to vacate the order of the County Court, and the whole case remained *in fieri*. Neither Moore nor Blunt had any vested interest in the office of administrator; and it seems to us that the County Court could not, after the appeal taken and carried up, have appointed an absolute administrator, although it might have appointed one *pendente lite*. If it had made such an absolute appointment, there would have been two administrators on the same estate, deriving their authority from different courts; such, therefore, could not have been the intention of the Legislature.

By the appeal the Superior Court obtained jurisdiction of the question generally; the whole case was open and stood exactly as it did in the County Court; and that Court had authority to grant letters to that person who was best entitled to the same, and who should then intervene, although not a party to the record in the County Court. The Act of 1777 declares that after the appeal is taken, the Superior Court shall have cognizance thereof, and shall grant letters to the persons entitled to the same. It does not confine the Court to grant letters to one or the other of the parties to the appeal; nor is the court, in our opinion, compelled to do so. If it was compelled to confine the appointment to one of the two litigating parties who originally began in the County Court, then many persons in equal degree of kindred, and perhaps better qualified for the trust, might be barred (12) from applying for the administration in consequence of being absent from the County Court at the time the motion was made, or through ignorance of the application for letters by either of the two litigant parties. But by putting the construction which we now do on the act of Assembly, we think the interest of the estates of intestates will be benefited, the rights of those who have an equal claim to letters secured, and the intention of the Legislature fulfilled.

Moore and Hannah (the wife of Blunt) are children of the intestate, and had equal claims to the administration. The Court has decided in favor of Mrs. Blunt, and we think it had a right to do so.

PER CURIAM. Judgment affirmed.

Cited: Sawyer v. Dozier, 27 N. C., 103; *Atkins v. McCormack,* 49 N. C., 276.

Dist.: Wallis v. Wallis, 60 N. C., 80.

JOHN GOODBREAD v. RICHARD LEDBETTER, SR.

In actions for slander it is not admissible to prove in mitigation of damages that previous to the speaking the words the plaintiff was in the habit of vilifying and abusing the defendant.

ACTION of SLANDER for words spoken. The plaintiff upon the trial before his Honor, *Judge Martin,* at RUTHERFORD, on the last circuit, proved the speaking of the words alleged; whereupon the defendant offered to prove, in mitigation of damages, that the plaintiff, before the speaking of the words, was in the habit of vilifying and abusing him. This evidence was rejected by his Honor, and the plaintiff obtaining a verdict, the defendant appealed.

Badger and *W. A. Graham,* for the plaintiff.
Pearson, for the defendant.

DANIEL, J. The defendant offered as evidence in mitigation of damages that the plaintiff before the speaking of the words, was in the habit of vilifying and abusing him. This evidence was rejected by the Court, and we think properly. The conduct or declarations of the plaintiff at the time of speaking the slanderous words may be proved, for they are a part of the fact, and essential to the proper understanding of it. General evidence of the plaintiff's bad character is also admissible in mitigation of damages in an action of slander, and this may be given under the general issue. *Paddock v. Salisbury,* 2 Cowen, 811; *Vick*

(13)

v. Whitfield, 3 N. C., 222; *Andrews v. Vandozer,* 11 John., 38; —— *v. Moor,* 1 M. & S., 284; *Leicester v. Walter,* 2 Camp., 251; *Rodriguez v. Tadmire,* 2 Esp., 720. The reason for admitting such evidence is, that a person of disparaged fame is not entitled to the same measure of damages as one whose character is unblemished. *Watson v. Christie,* 2 B. & P., 224; 2 Starkie, 369, 878. In *Alexander v. Harris,* 6 Munford, 465, evidence was offered that before the speaking of the words imputed to the defendant, the plaintiff was in the habit of vilifying, insulting, and provoking the defendant and his family; but the Court was of opinion that it was inadmissible. Such a course would lead to mischievous investigations, and might embrace the whole conduct of the parties towards each other for years. Besides, in legal contemplation, injurious language furnishes no excuse for the offended individual, who, brooding over the real or imaginary insult, deliberately, and in revenge, falsely charges a specific crime upon the previous wrong-doer. The evidence offered relates to the particular previous conduct of the plaintiff, and does not come within any of the rules of law which admit evidence in mitigation of damages.

PER CURIAM. Judgment affirmed.

Cited: Johnston v. Crawford, 61 N. C., 344; *Sowers v. Sowers,* 87 N. C., 306.

BENJAMIN LOGAN v. SQUIRE SIMMONS.

1. A conveyance by a woman before marriage is not, at law, under any circumstances, a fraud upon the marital rights of her husband.

2. Slaves loaned to a woman before marriage will be held by her husband as bailee, and the statutes of limitation will not operate upon his possession until the contract of bailment is at an end.

DETINUE for several slaves. Plea non-detinet, and on the issue made thereon, the cause was tried before *Martin, J.*, at RUTHERFORD, on the last circuit.

The plaintiff made title under his late wife, Phebe Simmons, and having proved her possession before their
(14) intermarriage, and his own after that event for more than three years, rested his case. The defendant put in and proved a deed executed by Phebe Simmons, the late wife of the plaintiff, whereby, the day before her marriage, she conveyed the slaves in dispute to him, the defendant, he being her son by a former marriage; and to repel the presumption arising from the possession of the plaintiff, he proved that after the execution of the deed he had lent the slaves to his mother for her life, or until he should think proper to resume the possession of them. The plaintiff contended that the deed under which the defendant claimed was a fraud upon his marital rights, and he offered much testimony on this point, which, as well as the opinion of his Honor thereon, it is unnecessary to state.

Upon the possession of the plaintiff and the presumption of title arising therefrom, his Honor instructed the jury that the plaintiff succeeded to the rights of his wife; that if the slaves were loaned to her, he held them in the same manner, and that as the act of limitation would not bar the action of the defendant until the contract of bailment was ended, so neither would the possession of the plaintiff during the continuance of that contract, under the Act of 1820, give him a title.

A verdict was returned for the defendant, and the plaintiff appealed.

Pearson, for the plaintiff.
Badger, for the defendant.

RUFFIN, C. J. It seems to this Court that the question made cannot arise in a court of law. It is deemed, therefore, unnecessary to advert either to the facts tending to establish the covenous interest alleged by the plaintiff or to the principles laid down by his Honor for the government of the jury in reference to that question.

The cases upon this subject have all been in the Court of Chancery, and the elementary books treat this as a doctrine and head of equity. There is no judgment at law in favor of the husband, and we think cannot be. The action could only be supported by viewing the husband as a purchaser for a valuable consideration, of his wife's chattels; and, therefore as a person upon whom on legal principles (15) a fraud can be committed. But the husband cannot be regarded as such a purchaser. Marriage, it is true, is a valuable consideration, when we speak of a consideration as necessary or adequate to raise an issue, or to support an antenuptial settlement or contract. But independent of any contract specially touching the wife's estate, the rights which the husband gains in that estate by the act of marriage solely, are not purchased by him in a legal sense, but conferred by the mere act and operation of law. The marriage is the only contract entered into by the parties. As a part of the policy of the law, and as an incidental consequence of the relation contracted between the parties, the law gives to the husband, in his own right, certain interests in his wife's property. But he does not purchase any part of it, not even that to which she is entitled at the instant of the marriage, much less does he contract for the purchase of that which is not hers then, but had been sold or given away by her before her marriage. "The *marriage* is an absolute gift of all chattels personal, in the wife's possession, in her own right." Co. Litt., 351, b. *Omnia quæ sunt uxoris, sunt ipsius viri.* But no more; he cannot get by the marriage what was not hers at or during the coverture. Indeed, he does not get the whole of what legally belongs to her, that is, so as to divest her title and vest it in him in his own right. For things held by her *en autre droit,* and as Lord Coke expressly says, things in which she has not a property but a bare possession, as goods bailed to the *feme,* are not given to the husband. This is to be understood to mean in his own right, and exclusively for

his own benefit. In respect to such things, he sues and is sued jointly with the wife; and upon her death they do not survive to him.

That the interest of the husband should be limited at law by that of the wife, as existing at the time of the marriage, or accruing during the marriage, is the necessary result of each of two legal maxims: that husband and wife make but one person, and therefore, that which binds her, binds him; and that one to whom the law transfers a thing, can
(16) thereby get no higher estate or greater interest than the person had from whom it was taken by that law.

In equity, a husband, except where the baseness of his motives in seeking or of his practices in obtaining the marriage excludes him from it, may have relief against the antenuptial voluntary bond or conveyance of his wife, made with the intent to prejudice him. In that Court they are to some purposes, and to this amongst others, regarded as distinct persons, and as having distinct and opposing rights; and he may be required to purchase her property, or considered as having purchased it. But no such case or principle is found at law.

The counsel for the plaintiff, however, insisted upon the general observation, that upon questions of fraud, the jurisdiction of courts of law and equity is concurrent. In its generality, that position is inaccurate. As to many, and most cases, it is true; but there are numerous frauds which can be alleged, investigated and relieved against in equity only. Where a conveyance is not avoided by statute, and where the objection is grounded upon imposition in the treaty, and not upon undue and unlawful means used for obtaining the execution—*the factum*—of the particular instrument, relief in equity is most appropriate, and generally can be had there only. A court of equity can do complete justice in such cases, by holding the instrument to be securities for what was advanced upon the treaty, or done under the contract, while a court of law would be in danger of doing wrong to one of the parties at all events, by being obliged to pronounce the whole conclusively void, or valid for all purposes. But an exception to the maxim alluded to must certainly be admitted in those cases in which a court of law does not recognize the right, in derogation of which the fraud was practiced.

Whatever may be the allegations of fraud, he only can make them in any court who shows himself to that court to have rights entitled to its protection. As the conveyance by the plaintiff's wife was before the marriage, at law the plaintiff could not by the marriage gain a property in the slaves conveyed; and therefore a court of law cannot admit the supposition that the conveyance was or could be in fraud of him. (17)

Upon the point of the statutes of limitation, 1715 and 1820, this Court concurs entirely with the Superior Court. The slaves were loaned by the defendant to his mother, until he called for them, which brings the case within the words of Lord Coke in the passage already cited, respecting personal goods bailed to a woman. Of such things the husband is not possessed in his own right, but in right of the wife, and holds as she held. He takes as *husband* and holds as bailee, as was said in *Collier v. Poe,* 16 N. C., 55, where this point was decided. The possession was never, therefore, adverse, so as to give operation to the statute. It is the opinion of the Court that the plaintiff has no legal title, and therefore the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Norwood v. Marrow, 20 N. C., 587; *Canoy v. Troutman,* 29 N. C., 158; *Gant v. Hunsucker,* 34 N. C., 259; *Logan v. Simmons,* 38 N. C., 494; *Nicholls v. Holmes,* 46 N. C., 363; *Long v. Wright,* 48 N. C., 292; *Hyman v. Moore, Ib.,* 419; *Gwynn v. Hodge,* 49 N. C., 170; *Bank v. Spurling,* 52 N. C., 402; *McArthur v. Johnson,* 61 N. C., 319; *Egerton v. Logan,* 81 N. C., 179; *Helms v. Green,* 105 N. C., 259; *Allen v. R. R.,* 106 N. C., 522.

JESSE WALKER v. THOMAS FEUTRESS.

The declarations of a party must be taken altogether, as well those to discharge, as to charge him, and where a person to whom an account had been presented, did not object to any of the items, but only contended for further credits, what he says must be submitted to the jury along with the evidence of his admissions arising from his silence as to the items.

ASSUMPSIT for the balance of an account, tried before his Honor, *Judge Seawell*, at RANDOLPH, on the last Fall Circuit. The account had a credit as well as debit side. The plaintiff to prove the debit side of the account gave evidence that the defendant was furnished with a copy of the account, that he then stated that the articles had many of them been gotten by his family, that he would take it home with him, and then insisted that he was entitled to further credits; that shortly afterwards the defendant returned to the clerk who had furnished the account, and had called for payment, and then stated, that he was entitled to further credits, and produced a statement of such others as he claimed, and insisted upon their being allowed. The clerk proved that neither at that time, or any other, did the defendant ever dispute any article in the account, but only insisted upon further credits.

(18) The defendant gave no evidence in support of the further credits, but claiming the benefit of all the credits, objected among other things that the account had not been sufficiently proved. The Judge instructed the jury that, when an account was furnished to the party against whom it was raised, and the party, after taking it and having time to examine its correctness, made no objection against any of the charges, but only claimed further credits, *that* was evidence to a jury of his admission of the justice of the account.

The jury found a verdict for the plaintiff for the whole amount of his account, and the defendant appealed.

No counsel appeared for the plaintiff.
Mendenhall, for the defendant.

DANIEL, J. The Court instructed the jury that where an account was furnished to the party against whom it was raised, and the party, after examining its correctness, made

no objection against any of the charges, but only claimed further credits, *that* was evidence to a jury of his admission of the justness of the account.

In general an admission may be presumed, not only from the declaration of a party, but even from his acquiescence or silence; as, for instance, where the existence of the debt, or of the particular right, has been asserted in his presence, and he has not contradicted it (2 Starkie, 37). But the defendant in this case neither acquiesced nor was he silent. He claimed further credits, and exhibited an account containing the items of them. What he said, taken all together, was not an admission of the account as it then stood. The admission or confession of a party must be taken together, and not by parts. As, if to prove a debt it be sworn that the debtor confessed it, but withal said at the time that he had paid it; his confession shall be evidence as to the payment as well as that he once owed the debt. This case is within the principle decided in the case of *Jacobs v. Farrell,* 9 N. C., 570, where the defendant admitted the justice of an account, but at the same time produced an account of equal amount against the plaintiff, which he alleged was correct; it was held that all the defendant said must be taken together, and left to the jury to believe such parts as they may think proper. It still rests with the jury to decide whether they will (19) believe the whole of it; for the matter of discharge may be rendered so improbable by circumstances as to make it unworthy of credit, while the other part may be sufficient to charge the defendant.

PER CURIAM. Judgment reversed.

Cited: McWilliams v. Cosby, 26 N. C., 112.

ROBERT WYNNE v. THOMAS B. WRIGHT.

1. Under the Act of 1822 (Taylor's Rev., ch. 1129), a person who carries jewelry from county to county for sale is liable to the tax of twenty dollars imposed upon peddlers.

2. The act imposing a tax upon itinerant dealers in jewelry is not repugnant to the Constitution of the United States, although the jewelry may have been imported from another State.

TRESPASS VI ET ARMIS, and on the trial before *Norwood* at SURRY, on the Spring Circuit of 1827, the jury returned the following special verdict:

"That the plaintiff is a permanent jeweler and silversmith in the town of Salisbury, that he or some one of his co-partners are in the habit of attending the different courts that are convenient to them, for the purpose of retailing jewelry, etc., not the manufacture of the State; that for that purpose he went to Rockford in said county" (viz., the county of Surry) "and applied for a merchant's license, tendering him" (that is, the defendant, who was then Sheriff of Surry County) "at the same time six dollars; he also presented the sheriff an affidavit properly drawn up, stating the amount of his stock offered and to be offered in this county, at not more than two thousand dollars; the sheriff refused the six dollars, and refused to give a license unless the plaintiff would pay the sum of twenty dollars: Upon which the plaintiff proceeded to sell without a license, and the defendant distrained a watch worth twenty dollars, the property in question, for the said sum of twenty dollars, which is the trespass complained of in the declaration. That the plaintiff had no store in the county of Surry; but had come to Rockford in a sulky with a trunk of jewelry, a part of which was sold by him as aforesaid."

(20) Upon these facts his Honor directed judgment to be entered for the defendant, and the plaintiff appealed.

No counsel appeared for the plaintiff.
Cook, for the defendant.

RUFFIN, C. J. The only question made in the Superior Court was, whether the plaintiff was bound to pay the tax imposed on merchants, or that on peddlers; he offering to pay the former, and the sheriff distraining for the latter. On that point, the opinion of this Court, like that of the Superior Court, is against the plaintiff.

The point arises on the Act of 1822, ch. 1129; which lays a tax of twenty dollars on every vehicle employed in the transportation of his goods by each person who shall peddle in any county in this State. The act does not define what shall constitute peddling within a county, or who is a peddler. The term was supposed to be sufficiently understood in common parlance, or had before, a legal meaning. By the Act of 1784, ch. 3, secs. 11 and 12 (which is omitted in the recent revisals), it is enacted that no person shall hawk, or *carry goods up and down the State,* without first obtaining a permit from some County Court; and that all *peddlers and other itinerant traders* shall, for the permit, pay fifty pounds as a license to hawk and sell for one year. In the sense of the law, therefore, a peddler is a petty dealer, who travels from place to place with merchandise for sale, and selling it by retail at other places than that of his fixed abode or settled place of business. This is made still clearer by the fourth section of the Act of 1822, which lays certain other taxes on every merchant or jeweler, who shall sell to certain amounts in any retail *store;* and thus distinguishes between those who carry on the same business at one place permanently and those who transport their wares from town to town or county to county. We therefore think the plaintiff is a peddler, within the meaning of the statute.

But in this Court another question has been argued, which is of more importance, as it involves an inquiry into the power of the Legislature to impose the tax, either on merchants or peddlers. The words of the second section are "that every person who shall peddle, in any (21) county, goods not of the growth or manufacture of this State, or any wooden clock, or the machinery or materials thereof, which shall not be of the manufacture of this State, or *jewelry,* which machinery or clock shall be manufactured of materials not of the growth, produce, or manufacture of this State, shall pay a tax of twenty dollars." The case

states that the articles retailed by the plaintiff were articles of jewelry, not manufactured in this State, but imported into it. Upon this the question has been made, whether a tax on articles imported into this State, or on the dealing in them, or a law requiring the purchase of a license to deal in them, be not repugnant to the provisions of the Constitution of the United States, that "no State shall lay any imposts, or duties, on imports or exports, except what shall be absolutely necessary for executing its inspection laws," and that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Upon this question the Court is not under the necessity of presenting any original views of their own. It seems to be fully decided by the opinions of the Supreme Court of the United States, in *McCullock v. Maryland,* 4 Wheat., 316, and *Brown v. Maryland,* 12 Wheat., 419. In the latter case it was held that an act requiring the importer of goods from a foreign nation to pay a tax for a license to sell them by the bale or package, was void. But it was admitted by *Chief Justice Marshall,* through whom the voice of the majority was given, that the words of the Constitution must necessarily be understood in a limited sense; and that although it was not easy to say precisely how far the restriction encroached on the general power of a State to tax persons or property within her jurisdiction, yet, that the restriction, upon a fair construction, ceased whenever the goods imported became mixed with, or incorporated into, the general mass of property of the State. A tax on the sale in bulk by the importer denies the free privilege of making such incorporation; but when once made, the restriction ceases, and the unshackled power of taxation commences. As examples of such incor-
(22) poration as will make the imported articles subjects of State taxation, the following instances are stated by the Chief Justice as being undeniable: If the importer sell the goods, and thereby uses the privilege purchased by the import duty; or if he break up his packages, and travel with the goods, as a peddler; or, if he keep a particular article, as a piece of plate or jewelry, for his own use; or if he sell in a peculiar manner, on which a tax is imposed, as by auction. In each of these cases the right of the State to tax

is deemed undeniable; because it is a necessary power, and to be interfered with so far only as the principle on which the prohibitions of the Constitution applies. That principle is, that the right of importation is acquired from the United States exclusively, and consists not barely in the right to bring the goods into the country, but also to mix them, when here, with the mass of property by a sale at wholesale. But when thus mixed, the right of the importer does not pass to his assignee, nor does the former exemption from taxation on a first sale adhere to the goods upon a resale. Nay, although the importer continue to be the owner, the goods become amalgamated with the other goods of the State, by either being withdrawn from the market, as subjects of commerce, and diverted to his private use, or by being offered for sale in small parcels, or in a peculiar manner, as by auction, by hawking, or otherwise by retail.

These inferences are made from the language of the Chief Justice, and if there could be any doubt of their accordance with his meaning, that doubt is removed by the remarks of *Mr. Justice Thompson,* who dissented. He states it as an admission of the majority of the Court that a tax on retail dealers in imported merchandise is not in violation of the Constitution. The point of difference between them was solely as to the period when the right of the State to tax accrued, or as to the condition and state in which the goods must be to become the subjects of taxation. All agreed in two points: that the State could not impose a duty on the act of importation; and that it could do so where the goods became mixed up with the other goods of the country by the packages being broken up, and sales by retail, in (23) any mode attempted. The majority of the Court held that the prohibition went beyond the tax on the introduction of the goods into the country, and embraced one on their introduction into the mass of the general property of the State, by a sale by the importer by wholesale. *Judge Thompson,* on the contrary, thought that it followed from the right to tax retail dealers, that there was the same right to tax those by wholesale; as he saw no intermediate between the two extreme alternatives, that the prohibition was, on the one hand, only against taxing the act of importation, and did not attach to the article, or to the disposition of it; or, on the other

hand, that it was against the right to tax the article at all, or any and all future dispositions of it; which last hypothesis he, as well as the other members of the Court, rejected as altogether untenable.

The result of the reasoning is this: that the term "imports," in the Constitution, means not only the "act of importation," but the "articles imported"; but that in the latter sense, the exemption from taxation continues only until the first wholesale disposition of them. After such disposition, or after the packages are broken up and the goods appropriated to private use or offered for sale at retail, or in any peculiar manner, they cease to be imports, "articles imported," within the meaning of the Constitution. They then become the subjects of State taxation, in all its modifications, either on the value or on the sale, as other property may be taxed.

It would seem to follow that a tax may constitutionally be imposed on such goods, thus appropriated to private use, or offered for sale in a peculiar manner, although they be taxed by the name of goods imported, or not of the production of the State. For a State may certainly exercise her own discretion in selecting the objects of taxation, amongst those which are subject to taxation; and the name given in the statute is only the mode of designation or description. Whenever the power of the State to tax arises, it is because the thing taxed is not "an article imported," as understood in the Constitution; and if the State tax it by that
(24) name, *that* cannot bring it again and by force thereof within the Constitution, and make it be such "an article imported" as it not subject to taxation.

But it is not necessary that the Court should in this case pursue the argument on that point to a conclusion; and it may be left to an occasion when the point will be unavoidable, whether the act, so far as it profess to tax a dealer in articles, brought from another country or State, by retail or hawking, does lay a discriminating tax, and is therefore void under the Constitution. At present the sole question is, whether the act is void in those parts in which no discrimination is made in it, upon the single ground that imported articles are, as such, perpetually exempt from State taxation. Such is the case here; for although the act enumerates many articles under the description, "not of the

growth, produce, or manufacture of this State," there is in reference to the article *jewelry* no such qualifications. It is taxed as jewelry, and not as jewelry imported. It certainly, therefore, comes within the rule laid down by the Supreme Court. If the argument against the tax were well founded, the Constitution would be made to do in the worst form that which, it is said, it was the very object of this provision to prevent—namely, compel the State to discriminate in taxation; and that against her own citizens. For if an article imported be always exempt from taxation, articles of the like kind produced in the State may be taxed, and those only can be; so that every tax law would necessarily discriminate between home and foreign productions—against the former, and in favor of the latter; which was certainly not meant. Another clause of the Constitution, and the practical construction of it, affords a strong illustration upon this point. It says no "tax or duty shall be laid by Congress on articles exported from any State," which is much stronger than the word "imports," in the restriction upon the States; because that might be held, plausibly, to mean only the act of importation, while that on Congress expressly extends to *articles exported.* Yet it has been the constant practice of Congress to lay excise duties and direct taxes on specific articles, such as carriages and slaves, in every State, without any exception of such articles of those descriptions as had been exported from another State. (25) No person ever contested the payment of the tax upon the ground that the article was exempt because it had once been exported from another State. It is not in truth within the meaning of the Constitution; which fairly construed, means such articles as have been separated from the mass of property of the State, with the view to exportation, and are prepared in bulk for exportation. If Congress can tax property exported from one State, after it has been imported into another, and amalgamated with the property of the latter, because it has then lost its distinctive character of an export from the State of its production, the reason seems equally just that the State into which it has been introduced should have the like power of taxation, because it has lost its distinctive character of an import into that State. It is in a condition then which makes it no longer necessary to look

to its origin, and precludes all inquiry into it. It is State property, and as such, liable to the taxation of both governments.

PER CURIAM. Judgment affirmed.

Cited: Huggins v. Hinson, 61 N. C., 129; *Davis v. Dashiel, Id.,* 116; *Range Co. v. Carver,* 118 N. C., 332.

JANE MURPHEY v. ISAAC T. AVERY and CHARLES McDOWELL, administrators of JAMES MURPHEY, deceased.

A release does not operate upon a mere possibility, therefore an ante-nuptial agreement whereby the wife released all her claims as widow to the estate of her intended husband, is not at law a bar to her petition for a year's support.

THE plaintiff, as the widow of James Murphey, filed her petition in the County Court of BURKE, for the year's allowance which the Act of 1796 (Rev., ch. 469) secures to widows, out of the personal property of their husbands, when they shall have died intestate. The case was carried by appeal to the Superior Court, where the defendants relied upon the covenants in an ante-nuptial contract between the plaintiff and her late husband, as a bar to her claim. The words of the covenant relied on were, "that she" (the plaintiff) "will not at any time, either now or hereafter, set up any claim
(26) or claims to the real or personal estate of the said James Murphey, which he may now own, or own at the time of the marriage, or may thereafter acquire during the coverture, either in right of dower, descent, inheritance, or distributive share, as widow," etc., and that she "doth release, surrender, and quit-claim forever, any present or future interest, claim or demand to any part of the estate, inheritance, dower lands, or any other property, either real, personal or mixed, or to any distributive share as next of kin, to which the said Jane Fleming (the plaintiff) might have been otherwise entitled." His Honor, *Judge Donnell,* on the Spring Circuit of 1832, *pro forma,* dismissed the petition, whereupon the petitioner appealed. It was agreed be-

tween the parties that no advantage should be taken on either side to any irregularity in the appeal from the County to the Superior Court, or in any of the other proceedings.

Devereux, for the petitioner.
Badger, for the defendants.

GASTON, J. The sole question presented by the case is, whether the plaintiff is not *barred* of all claim to the allowance for which she has petitioned, by the operation of certain covenants, contained in an ante-nuptial contract, made between herself and her late husband. This involves two inquiries: first, whether any of these covenants embraces the claim; and, secondly, if they do, whether they constitute a valid *defense* against it. On the first inquiry we are of opinion with the defendants. The covenants extend to every claim, of every sort, which she can set up to the real or personal estate of her husband, as *his widow.* On the second, after examination of the various Acts of Assembly relating to this subject (see Acts of 1796, Rev., ch. 469; 1813, Rev., ch. 858; 1832, Pamph., ch. 20), we are of opinion that the widow's claim to a year's allowance is one completely *legal,* and which cannot be destroyed by anything short of a *legal bar.* It is clear that the covenants in this agreement do not amount to a *legal release. Such* a release could not be made of a possibility. If they constitute a release in equity, it will be for a court of equity so to pronounce. If the defendants have a remedy at law for a breach of the (27) covenants in preferring this claim, they can there recover such damages as will remunerate the estate of their intestate for the injury thereby sustained.

PER CURIAM. Judgment reversed.

Cited: Hooks v. Lee, 43 N. C., 165; *Cauley v. Lawson,* 58 N. C., 134.

CALEB SPENCER, admr. de bonis non of JEREMIAH GIBBS, decd.,
v. WILLIAM COHOON.

1. An entry on the records of the County Court, "It is ordered that S. G. be appointed administrator of J. G., on his entering into bond in the sum of $4,000, with J. B. and W. S. securities," is a valid grant of administration, although it be not stated on the record that the administrator gave bond, and was properly qualified.

2. The want of such statement may render the grant defective, and authorize the County Court to annul it; but until that is done, the grant must be respected as valid by other Courts.

AFTER the new trial granted in this case, at December Term, 1833 (15 N. C., 226), it was again tried at HYDE on the last circuit before his Honor, *Judge Norwood,* when the following entry on the minutes of the Court of Pleas and Quarter Sessions of Hyde County was offered in evidence on the part of the defendant, viz.: "Court of Pleas and Quarter Sessions for Hyde County, November Sessions, A. D. 1816. It is ordered, that Stephen Gibbs be appointed administrator of the estate of Jeremiah Gibbs, on his entering into bond in the sum of $4,000 with John J. Bonner and William Selby, securities." Much parol evidence was admitted by the Court to show the nature of the bond offered by Stephen Gibbs, and his qualification as administrator; but it is unnecessary to state it, as the opinion of the Chief Justice is founded entirely upon the effect of the entry on the minutes of the County Court. In the Court below, his Honor was of opinion that Stephen Gibbs had been duly constituted the administrator of Jeremiah Gibbs; whereupon a verdict was rendered in favor of the defendant, and the plaintiff appealed.

W. C. Stanly, for the plaintiff, referred to the cases of *Hoskins v. Miller,* 13 N. C., 360, and this case when
(28) formerly here (15 N. C., 226); and argued that the *fact* of the *acceptance of the administration bond* by the Court, and also of the *qualification of the administrator,* must be entered of record; and that if such facts do not *appear of record,* they cannot be supplied by parol evidence, and the grant will, consequently, be of no effect, the grant being predicated upon the giving bond and qualification as conditions precedent.

Badger, for the defendant.

RUFFIN, C. J. The parties having brought up this case again, with a statement which exhibits distinctly the contents of the record of the County Court, professing to be a grant of administration to Stephen Gibbs, we are enabled to decide it upon its proper principles.

It seems to us that the parol evidence ought not to have been received; for the acts of a Court can be proved only by its records. That evidence is, therefore, laid aside.

The question rests upon the construction proper to be put upon the minutes of the Court. We are satisfied that it is to be taken as a present grant of administration. It is argued to the contrary upon the words "*on* his giving bond"; and it is supposed that the argument is supported by my observations in *Hoskins v. Miller,* 13 N. C., 360. What I said is not, perhaps, as clear as it ought to have been; but it was certainly not intended to state the proposition supposed, and the contrary is rather to be inferred. The grant, then, was deemed an immediate one; and it was remarked that an order that administration *would be* granted to W. T. upon his giving bond, would be conditional and nugatory. But that was said upon the idea that the order was in its terms plainly prospective, as is to be collected from the expression *"would be granted."* It still left the inquiry open, what effect is to be given to an order like this, whether it is to be deemed a memorial of what the Court had done, or was doing, or of what it then resolved it would do in future. A conditional and incomplete administration is inferred from the words "*on* his entering into bond." But the minute ought not to be so understood. Those words are but equivocal to the purpose for which they are relied on. They might be (29) construed as conditional, if the subject to which they relate was a stipulation in a contract, that one person would do an act, on the other party's doing another act. But in connection with this subject-matter, the contrary is strongly to be inferred. Such an order would be so absurd that the intention to pass it cannot be presumed, unless the terms will not admit of any other construction. It would be vain and idle, for it would not bind the Court or anybody else. The fair meaning is, that "on his entering into bond," the appointment was then made; that the giving the bond at that time was the inducement to the order. It is the same

as if the words has been "he is appointed on his motion," or, "it is ordered on his motion that he be appointed," which nobody could misunderstand. The minute is certainly very short and irregular; but it is sufficient to satisfy any person that the Court did thereby intend to commit administration, and so to certify to their successors. It does not state that the oaths of office were taken, it is true; and for that reason, and because the bond turns out to be defective, the administration might probably be repealed as obtained irregularly and by surprise. But no other court can declare it void; for it was granted by the competent court, and must be respected until revoked, although committed without taking bond or administering the oaths, those being points into which no other court can collaterally inquire.

PER CURIAM. Judgment affirmed.

Cited: Davis v. Lanier, 47 N. C., 210; *Rodgers v. Cherry,* 52 N. C., 540; *Jones v. Gordon,* 55 N. C., 354; *Hughes v. Hodges,* 94 N. C., 60; *Mobley v. Watts,* 98 N. C., 286; *Howerton v. Sexton,* 104 N. C., 86.

JOHN MARTIN v. JOSIAH COWLES.

A purchaser for a valuable consideration without notice from a fraudulent grantee, acquires a good title against the creditors of the original fraudulent grantor.

ACTION upon the covenant for quiet enjoyment contained in a deed of bargain and sale, executed to the plaintiff
(30) by the defendant, and the only question was whether the plaintiff had been evicted under a better title than conveyed to him by the defendant.

Upon the trial before his Honor, *Judge Martin,* at SURRY, on the last circuit, it appeared that the land conveyed to the plaintiff had formerly belonged to one Gentry, who conveyed to one Hudspeth for the purpose of defrauding his creditors. Hudspeth became indebted to the defendant, who, without any knowledge of the fraud, had the land sold to

satisfy his debt, became the purchaser himself, and afterwards sold to the plaintiff. At the time of the conveyance by Gentry to Hudspeth the former was indebted to one Edwards, who, after the purchase of the defendant and his sale to the plaintiff, had an execution levied on the same land, became the purchaser, and took a deed from the sheriff. He then brought an action of ejectment against one Buchannan, who was in possession of part of the land as tenant of the plaintiff, recovered judgment against him, and evicted him by a writ of possession. Upon these facts the jury, under the charge of his Honor, rendered a verdict for the plaintiff, and the defendant appealed.

No counsel appeared for either party.

DANIEL, J. If the plaintiff had the better title to the land, and could have defended the possession of Buchannan, his tenant, in the action of ejectment which was brought by Edwards against him, and did not do so, he has no right to maintain this action; for the covenant for quiet enjoyment was, in law, not broken. It therefore becomes necessary for us to inquire whether he had the better title. The Court instructed the jury that if the conveyance from Gentry to Hudspeth was fraudulent as to his, Gentry's, creditors, the land was liable to the claims of the creditors in the hands of Cowles (and it must be stronger as to Martin), although he had no notice when he purchased. This opinon of the Judge is sanctioned by a high name, for the Chancellor of New York made a similar decision in the case of *Roberts v. Anderson,* 3 John. Chan., 371. The Chancellor said: "The original deed from the debtor to a fraudulent grantee *is utterly void* as to creditors; and as against them, the (31) grantee can make no conveyance, for he has no title as against them. The statute in its enacting clause operates on the deed from the fraudulent debtor, and the proviso in the act applies to that original conveyance from the debtor, and saves it when made to a *bona fide* purchaser for valuable consideration. Such a conveyance is supported by the proviso, however fraudulent the intention of the grantor might be." But there was an appeal from the Chancellor's decision, and the decree was reversed in the Appellate Court (18

John., 518). There *Judges Spencer* and *Platt* gave elaborate opinions. They go into a long train of reasoning to show that by a proper construction of the proviso in the statute, 13 Eliz., a *bona fide* purchaser from a fraudulent vendee has a good title against any claim of a creditor of the fraudulent vendor. They say that the deed is good as between the parties; as against the grantor the deed is effectual; that fraudulent grantee has a title and a right to alienate, and although the estate is voidable, and may be avoided and divested whilst in the hands of the first grantee, by action of the creditors of the first grantor, still, if the grantee convey the estate to a *bona fide* purchaser, his title is protected by the proviso. Neither policy nor justice required the Legislature to declare otherwise, because the *bona fide* purchaser has, by those principles, as good a right to be protected in his purchase and saved from the loss of his money as the creditor has to obtain his debt: he is innocent, whatever may be the guilt of others. And by the adoption of this rule the stability of property would be more secure, and therefore the proviso was inserted, not only to protect the *bona fide* grantee of the fraudulent grantor, who before was protected by the common law, but also to protect the *bona fide* vendee of the fraudulent grantee. The terms of the proviso are broad and extensive; they apply to any conveyance, whether from the fraudulent grantor or fraudulent grantee. It meant to protect a *bona fide* purchaser for valuable consideration, without notice of the fraud, from the operation of the statute. No deed can be pronounced, in a legal sense, *utterly* (32) *void,* which is valid as to some persons, but may be avoided at the election of others. In Bacon's Ab., tit. *Void and Voidable,* we have the true construction. A thing is void which is done against law at the very time of doing it, and when no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself, after it is done. The words "utterly void," in the statute, must necessarily be construed as voidable only by the party grieved. It is admitted, on all hands, both in England and this country, that a *bona fide* purchaser from a voluntary grantee, who has first obtained his conveyance, shall hold the land against the subsequent *bona fide* vendee, from the origi-

nal grantor; and that the statute 27 Eliz. does not make void the conveyances; for the rule here is *qui prior est tempore, potior est jure.* And this rule arises out of what is said to be a proper construction of the proviso in the statute of the 27 Eliz. Roberts Fraud. Con., 496. *Newport's case,* Skinner, 423. 3 Lev., 387. *Doe v. Martyr,* 4 Bos. & Pul., 332. We have met with no decision in the English courts of law which establishes this construction of the statute of the 13 Eliz.; but in the case of *George v. Millbanke,* 9 Ves. jun., 189, *Lord Eldon,* after much deliberation, held the equity of a purchaser from the voluntary appointee of a debtor to be preferable to the equity of his general creditors who had obtained no specific lien; and in his reasoning professes to follow by analogy the rule which obtains at law. This we consider as a strong recognition of this construction. It is also worthy of observation that the wording of the proviso in the two statutes is substantially the same. And it may be asked, if there can be any good reason why the title of the *bona fide* vendee from a voluntary fraudulent grantor should be declared good, in a case arising under the statute of the 27 Eliz., and not so in the other. Secs. 4. 5, and 6 of our Act of 1715 (Rev., ch. 7), although not in *totidem verbis,* are nevertheless, substantially, a copy of the statute of the 13 Eliz. Sec. 4 declares a conveyance made to defraud creditors *utterly void;* but as between the parties to the conveyance it stands good according to the prin- (33) ciples of the common law. Sec. 6 is in the nature of a proviso. It runs thus: *"Provided always, and be it further enacted,* that this act, nor anything hereinbefore contained, shall not extend, or be construed to impeach, defeat, or make void, any conveyance or assurance, interest, limitation of use, or uses of, in, to, or out of any lands or tenements heretofore at any time had or made, or hereafter to be *bona fide* made, upon and for good considerations, to any person or persons whatsoever, anything before mentioned to the contrary notwithstanding." The doctrine, whether a *bona fide* purchaser for a valuable consideration, without notice, can protect the estate in his own hands against creditors, where he derives his title to the estate through a grantee, to whom it was originally conveyed for the purpose of defrauding the creditors of the original grantor, has been ably examined by *Judge*

Story, in the case of *Bean v. Smith,* 2 Mason, 272, and his opinion upon the subject (in which he reviews, and disapproves of, the decision made by the Chancellor of New York, in the case of *Roberts v. Anderson,* before mentioned), contains much learning and solid reasoning, and, to my mind, satisfactorily establishes the principle that the *bona fide* purchaser from the fraudulent grantee is protected by the proviso in the 13 Eliz. against the creditors of the fraudulent grantor. His opinion is in conformity with that given by the Court of Errors in New York (18 John., 518). I think the same rule must be followed under our statute.

If any doubt existed whether Cowles could be considered a *bona fide* purchaser, none exists that Martin, who purchased from him, was a *bona fide* purchaser; and if he negligently permitted a recovery in ejectment to be effected, it does not entitle him to maintain this action. We are therefore of the opinion that the Judge erred in his charge to the jury, and that the judgment must be reversed and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: Halcombe v. Ray, 23 N. C., 345; *King v. Cantrel,* 26 N. C., 253; *Toole v. Darden,* 41 N. C., 396; *Hogan v. Strayhorn,* 65 N. C., 287; *Saunders v. Lee,* 101 N. C., 6.

(34)

EUGENIA A. FENNER et al. v. HENRY N. JASPER.

1. Where it did not appear, either in the order for a commission to take the private examination of a *feme covert*, under the Act of 1751 (Rev., ch. 50), or in the commission itself, that she was an inhabitant of another county, or so aged or infirm as to be unable to travel to Court, it was *held*, that the deed was inoperative to convey the wife's interest in the land.

2. It seems that it must appear that the commission and the certificate of the commissioners were returned to the Court approved and ordered to be registered, or the deed will be invalid as to the wife's estate in the land.

THIS was an action on the case, in nature of an action of waste, commenced in the county of Franklin, but removed to the county of WARREN, where, on the last circuit, it was submitted to his Honor, *Judge Donnell,* on the following case agreed: In the year 1827 the defendant intermarried with Sarah M. Fenner, widow of Richard J. Fenner, and the plaintiffs are the children of the said Sarah by the said Richard. The said Sarah had issue by the defendant born alive, and in the year 1829, departed this life, leaving the plaintiffs, her only children and heirs at law, and the defendant, her husband, surviving. Before the death of the said Sarah, the defendant and the said Sarah executed and delivered to one N. B. Massenburg a deed intended to convey, and expressed in apt and sufficient words to convey in fee simple to the said Massenburg, a tract of land in Franklin County, of which, at the time of the marriage of the said Sarah with the defendant, she was seized in fee simple; and afterwards the said Massenburg, by deed duly executed, conveyed all his estate in the said land to the defendant and his heirs, which deed was sufficient to convey, and did convey the fee simple to the defendant, if the deed of the defendant and the said Sarah was sufficiently proved and authenticated to operate in law upon her estate in the land. All the proceedings had touching the probate of the said deed, and the examination of the said Sarah, as to her free consent in executing the same, appear in the following entry on the minutes of the County Court of Franklin, at December Term, 1828:

"The execution of a deed from Henry N. Jasper (35) and Sarah M., his wife, to Nicholas B. Massenburg,

was duly proven by the oath of James Newbern, in open court; whereupon on motion it is ordered by the Court, that C. A. Hill and Thomas Crocker, esquires, be appointed to take the private examination of the said Sarah M., as to the voluntary execution, on her part, of the said deed, and that for that purpose the clerk issue a commission to the said ....., esquires," and in the following endorsements on the deed of the defendant and the said Sarah to the said Massenburg, on which James Newbern appears the subscribing witness: "Franklin County, December Sessions, 1828. I certify that the execution of the within deed was duly proven in open court, by the oath of James Newbern, and was, on motion, ordered to be registered. Teste, S. Patterson, C. C."

STATE OF NORTH CAROLINA—Franklin County,
Court of Pleas and Quarter Sessions, December Sessions, 1828.

"*To Charles A. Hill and Thomas Crocker, Esquires—Greeting:* Whereas, Nicholas B. Massenburg hath produced a deed made to him by Henry N. Jasper and Sarah M. Jasper, his wife, of a certain tract of land lying in the county of Franklin aforesaid, and procured the due execution of the same to be proved by the oath of James Newbern, in open court: Know ye, that we, in confidence of your prudence and fidelity, have appointed you to take the private examination of Sarah M. Jasper, wife of the said Henry N. Jasper, concerning her free consent in her executing the said deed of conveyance, and therefore we command you, that at such place as you may think fit, you, privily and apart from her husband, examine her, the said Sarah M. Jasper, whether she executed the said deed freely and of her own accord, without fear or compulsion of the said Henry N. Jasper, her husband, and the examination so by you made, that you return on the deed aforesaid. Teste, S. Patterson, C. C.

STATE OF NORTH CAROLINA—Franklin County:

(36) Pursuant to a commission to us directed by the worshipful County Court of Franklin County aforesaid, at December Sessions, 1828, we, Thomas Crocker and

Charles A. Hill, justices of the peace of the said county, proceeded to take the private examination of Mrs. Sarah M. Jasper, wife of Henry N. Jasper, the parties to the within deed, when she stated that she executed the within deed of her own free will, without any influence or control of her husband, the aforesaid Henry N. Jasper. Given under our hands and seals this 10 Dec., 1828.

THOS. CROCKER, [L. S.]
C. A. HILL, [L. S.]"

After the death of the said Sarah, the defendant continued in possession of the land, claiming to hold the same as tenant in fee simple, and hath cut down timber trees, and done other acts which do in law amount to waste in a tenant for any less estate; and the plaintiffs claiming that he is only tenant by the curtesy, and that the fee simple and inheritance is in them by descent from their mother, have brought this action to recover damages for the said waste.

Upon this case, his Honor being of opinion that the deed of Jasper and wife had not been so proved and authenticated as to pass the wife's title, gave judgment for the plaintiffs for the sum agreed as to the amount of damages, from which the defendant appealed.

Badger, for the defendant.
W. H. Haywood, contra.

RUFFIN, C. J. The Act of 1751 (Rev., ch. 50) gives two modes of taking the acknowledgment of a married woman, of a deed executed by her husband and herself: the one in open court of the county where the lands lie, or before a Judge; and the other by two or more commissioners authorized by a commission issued by the Clerk of the County Court. The act does not treat these methods as equally proper and beneficial to the wife, and give to the parties an election of the one or the other in every case; but it substitutes that by commission for an acknowledgment in court, only when it shall appear that such an acknowledgment cannot be made because the wife cannot travel to court (37) by reason of age, infirmity, or a residence in another county.

These provisions being for the protection of the wife, the principle of construction laid down in *Burgess v. Wilson,* 13 N. C., 306, and other cases, is to require a strict observance of every ceremony prescribed in the statute, and in the order as there prescribed, as tending to render the intended protection the more effectual. A literal construction is the true construction, according to the spirit of the act.

The deed in this case was acknowledged under a commission from the County Court; and neither the commission nor the order of record for issuing it sets forth that Mrs. Jasper was either so infirm or aged that she could not travel to court; while upon its face, the deed itself states the husband and wife to be inhabitants of Franklin County, in which the lands are situate.

Upon the principle established such an acknowledgment is defective, and the deed must be deemed invalid, unless the order of the County Court for the commission precludes all inquiry into the propriety and grounds of that order. The acts of a court of record are always conclusive of the truth of the matters stated in them; and also generally, perhaps, of the existence of those facts, without which the order or judgment could not be legally made. But this case cannot come within the rule. It would defeat the purposes of the Legislature, to be collected from the several parts of the act construed together, and as almost literally expressed is some of the provisions. The authority to issue a commission is found in the third section, which comes in by way of proviso to the second, and is a special authority, founded upon a particular state of facts. That state of facts may, therefore, reasonably be required to appear affirmatively. But there are other reasons which imperatively determine that it must thus appear. The commission may be ordered as well by a Judge out of court, as by the County Court; but it is in all cases to be issued by the Clerk of the County Court, and be returned to that Court. Now in the fourth section, the form of the
(38) commission is set forth *in his verbis;* and in it is recited, as the cause for taking the acknowledgment by commission, that it has been represented to the Judge or Court that the wife was not an inhabitant of this State, or was so aged or infirm that she could not travel to them. This recital in the act of the clerk can be founded only on a sim-

ilar one in the order; and therefore must be authorized by such specific averments in the order. Whatever, therefore, may be the general rule, there cannot, under the Act of 1751, be a presumption from the order, of any of these facts, where the order itself is silent as to their existence; because in the other proceedings arising out of the order those facts must be distinctly and affirmatively stated.

It will be perceived that the validity of the order does not depend upon the truth of the representation made to the Court, as appearing upon evidence afterwards; for of that the adjudication is conclusive. But the question is determined upon this: that the commission can be issued only under particular circumstances, and that those circumstances must be proved by the record and commission themselves; or at least by one of them.

This defect being fatal, it is unnecessary to look farther. But it may be mentioned that there are others which seem to be equally so. Among them are these: that it does not appear that the commission, or certificate of the commissioners, was ever returned to the County Court, much less that the Court was satisfied therewith and ordered the proceedings to be registered. The only order for a registration is that made on the probate by the subscribing witness; which extends to the deed as that of the husband only.

PER CURIAM. Judgment affirmed.

Cited: Ives v. Sawyer, 20 N. C., 181; *Skinner v. Fletcher,* 23 N. C., 316; *Joyner v. Faulcon,* 37 N. C., 392.

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(39)

WILLIAM A. ERWIN v. JOHN M. GREENLEE.

Where the defendant in an execution fraudulently induces the sheriff to sell unsound property of his, and at the sale fraudulently represents it to be sound, an action for a deceit lies against him by the purchaser.

ACTION for a deceit in the sale of a negro, tried before his Honor, *Judge Martin,* at BURKE, on the last circuit.

The Sheriff of Burke had levied sundry executions against the defendant, on several negroes, and taken bond for their forthcoming on the day of sale. The negroes levied upon were not produced at the sale, but the defendant substituted another, which the sheriff accepted, and sold to the plaintiff. At the sale the defendant stood by and publicly recommended the negro as an intelligent boy. It was proved that the boy was an idiot, and that the defendant knew it. It was objected for the defendant that the plaintiff could not recover, because he who purchases at a sheriff's sale purchases at his own risk, and it was his folly to listen to the recommendation of the defendant; that there could be no implied warranty as to title, the sheriff being between the plaintiff and defendant. His Honor charged the jury that if a defendant in an execution is merely passive while a sheriff levies upon and sells his property under process, he is not liable in an action of deceit, though the property be defective and he knew it, and failed to disclose it at the sale. But that if, with a fraudulent intent, he substituted or caused the officer to take, unsound in the place of sound property; and if in pursuance of such fraudulent intent, he stood by at the sale and made false representations about the soundness of the property, whereby a purchaser was defrauded, such purchaser could recover in an action of deceit. The rule being that where an intent to commit a fraud is accompanied by an overt act, whereby the fraud is complete, the fraudulent actor is liable in an action of deceit, although the deception is effected by the unwilling instrumentality of another.

(40) The jury found a verdict for the plaintiff and the defendant appealed.

No counsel appeared for either party.

DANIEL, J. We have attentively examined this case; and are of opinion that the law was correctly laid down by the Judge in his charge, and for the reasons there given the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: March v. Wilson, 44 N. C., 148.

WILLIAM D. SMITH v. BENJAMIN WILSON.

1. A registered copy of a deed cannot be received as evidence of title, without accounting for the absence of the original.

2. In trespass *quare clausum fregit*, if the plaintiff fails to prove *title* to the *locus in quo*, he must, to entitle him to recover, prove that the trespass was committed on lands of his, either enclosed or improved by cultivation.

TRESPASS QUARE CLAUSUM FREGIT, tried before his Honor, *Judge Martin*, at BUNCOMBE, on the last circuit. On the trial the plaintiff gave in evidence a grant from the State to James Miller, and a deed of conveyance from Miller to John Carson, and then offered a registered copy of a deed from Carson to himself. The reception of this copy was objected to on the ground that the original should have been produced or its loss accounted for, and was rejected by the Court. The trespass complained of was committed upon woodlands, and old cleared lands, lying out of the enclosures of the plaintiff, but within the bounds of the grant under which the plaintiff claimed. His Honor instructed the jury that the plaintiff could not recover, unless he proved a trespass on lands enclosed by his fences, or improved; that if the trespass was on other parts of his lands, not so enclosed, or actually improved by cultivation, although the same might be within the boundaries of the grant under which he claimed, he could not recover. The plaintiff submitted to a nonsuit, and appealed.

No counsel appeared for either party. (41)

DANIEL, J. The plaintiff offered a copy of the deed from Carson to himself to complete his chain of title, so as to show that he had a constructive possession of the lands trespassed on by the defendant. This evidence was properly rejected, as he had not accounted for the original deed, which was the best evidence of his title. The practice has invariably been to receive the affidavit of the party as to the loss or destruction of the original. In *Taylor v. Riggs*, 1 Peters, 591, the Court say, that the affidavit of the party to the cause, of the loss or destruction of an original paper, offered in order to introduce secondary evidence of the contents of the paper, is

proper. If such affidavit could not be received, of the loss of a written contract, the contents of which are well known to others, or a copy of which is at hand, a party might be completely deprived of his rights, at least in a court of law.

It is a sound general rule that a party cannot be a witness in his own cause; but many collateral questions arise in the progress of a cause to which this rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation of it, often depends upon the oath of the party. An affidavit of the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection. On incidental questions, which do not affect the issue to be tried by the jury, the affidavit of the party is received. The testimony which establishes the loss of a paper is addressed to the Court, and does not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not itself prove anything in the cause. And as a matter of practice, it may be observed that it ought to be in writing, that the Court only may hear it.

Secondly. Trespass to lands is an injury to the possession; and the plaintiff must show that he has either a constructive or an actual possession of the *locus in quo*. The plain-
(42) tiff having failed to show that he had any title to the land, when the supposed trespass was committed, therefore failed to show a constructive possession; then the Court was certainly right in stating to the plaintiff that he could not proceed without showing an *actual* possession of the *locus in quo* the trespass was alleged to have been committed.

PER CURIAM. Judgment affirmed.

Cited: Bynum v. Thompson, 25 N. C., 581; *Harper v. Hancock*, 28 N. C., 127.

ABSALOM SMITH v. ALEXANDER GRAY, exr. of BENJAMIN MEARS.

Where a person assigned his distributive share in an estate, and afterwards collected and used the amount due upon it, assumpsit will not lie against him at the instance of the assignee.

AT the trial of this case at RANDOLPH, on the last circuit, before his Honor, *Judge Seawell,* it appeared that it was ASSUMPSIT for money had and received, under the following circumstances: The testator of the defendant, in his lifetime, executed an instrument of writing, purporting to convey to the plaintiff his distributive share in a certain estate. The instrument was deposited in the hands of the defendant, who was one of the subscribing witnesses, with directions to keep it. The testator afterwards received the distributive share himself, and after his death the plaintiff brought this suit against the defendant, his executor, to recover the amount. There was much testimony to show the nature of the delivery of the instrument of writing into the hands of the defendant, but the view taken of the case by the Court renders it unnecessary to state it particularly. The jury, under the intimation of his Honor, found for the defendant, and the plaintiff appealed.

Winston, for the plaintiff.
No counsel appeared for the defendant.

GASTON, J. We deem it necessary to decide but one of the points presented for our consideration in this case. Whether the instrument purporting to be an assign- (43) ment to the plaintiff of the distributive share, to which the defendant's testator was entitled, and for which he had obtained a decree, was originally delivered as a *deed* or as an *escrow;* whether, if delivered as an escrow, it became his deed *by relation,* from the time of the original delivery; whether, if the first delivery were as an escrow, a subsequent delivery as a deed was not made; or, whether there was not evidence upon which the jury might find either an original or a subsequent delivery as a deed; these are questions upon which we forbear to express an opinion. Let the law on these points be as it may, we nevertheless approve of the instruc-

tion given by the Judge "that the plaintiff could not in law maintain this action."

The plaintiff asserts his right to the money alleged to have been received to his use, by the defendant's testator, solely under this supposed assignment. Now, whatever operation this instrument may have in equity, *at law* it did not transfer a title to the distributive share nor to the money decreed upon it. At law it could operate only as authority to the plaintiff to collect the money, and perhaps justify him in retaining it after it should have been collected. When, therefore, the defendant's testator received the money, he received what in law belonged to him, and we do not see, therefore, how the law can infer upon this receipt an undertaking to pay the money over to the plaintiff. The case does not appear to us to be analogous to those in which a man has received money *as the agent* of another, to which his principal had not a legal right. There the money was received as the money of the principal, avowedly to the use of the principal, and must be paid over to the principal, unless the payment be intercepted by him who has a right to forbid it. The *dictum* of *Abbott, C. J.,* in *Cooper v. Wrench,* 1 Dowling & Ryland, 482 (16 E. C. L., 51), and the decision in *Allen v. Impett,* 8 Taunt., 263 (4 E. C. L., 97), seem to us to depend upon this position, and if correct, can be supported only by it. Here indeed the *legal* relations of the parties were those of principal and agent, but the defendant's testator stood in the relation of principal, and the plaintiff in that of
(44) agent. The plaintiff could maintain no action of law against the defendant's testator, unless it were founded on some covenant in the deed, or *possibly* on an express promise to pay the money collected. We cannot believe that the action of assumpsit for money had and received may be maintained by the assignee of an unnegotiable chose in action against the assignor, merely because he has collected the money after an ineffectual attempt to transfer the debt. As to the rights of the parties in a court of equity, none but that court is competent either to determine or to enforce them.

PER CURIAM. Judgment affirmed.

Cited: Pass v. Lee, 32 N. C., 416; *Monday v. Siler,* 47 N. C., 390.

THEOPHILUS EASON v. WILLIAM D. PETWAY.

A sheriff is not bound, independent of the Act of 1826, ch. 31, to levy an execution, and raise the money upon the property of the principal debtor, in preference to that of the surety. And if he even combines with a third person, to throw the debt upon the surety, when he might have made it out of the principal, he does not thereby render himself liable to the action of the surety.

ACTION on the case, tried at PITT, on the Fall Circuit of 1830, before his Honor, *Judge Daniel*. The declaration contained two counts, on the last of which the question arose. This count alleges, in substance, that the plaintiff became bound as the surety for one Henry Brownrigg, in two several notes to one Gray Little for one hundred dollars each, and the said Brownrigg being in failing circumstances, and the said notes being due and unpaid, the plaintiff applied to Brownrigg to secure him on account of his liability, and that at the special instance and request of the plaintiff, the said Gray Little sued out two warrants on the notes aforesaid, against Brownrigg, and the plaintiff as his surety, on 5 March, 1824, on which warrants judgments were confessed on the same day by both the defendants; that soon after the judgments were obtained executions were issued thereon, and were placed in the hands of the defendant, who was then an acting constable in the county of Edge-
combe, with instructions to levy the same on the prop- (45)
erty of Brownrigg, and that the executions were levied by the defendant, on 18 December, 1824, on two lots, Nos. 9 and 10, in the town of Stantonsburg, the property of Brownrigg, which were more than sufficient to satisfy said executions; that the defendant Petway, well knowing that the plaintiff Eason was the surety of said Brownrigg, and that the said notes were sued upon at the request, and for the benefit and protection of the plaintiff, with a view to injure the plaintiff, and to contrive that the said money should be levied out of the property of the plaintiff, and not satisfied by the sale of Brownrigg's property, and fraudulently combining and confederating with one Elijah Price, who also had placed claims against Brownrigg in defendant's hands for collection, to injure the plaintiff, and so to contrive that the said executions should be satisfied out of the property

of the plaintiff, purposely and fraudulently refused to return the said levies to the next County Court of Edgecombe, in order that the property levied on might be condemned and sold to satisfy said execution, although he was expressly instructed and required so to do; but that at the same time, viz., February Sessions, 1825, of said Court, the defendant returned sundry executions at the instance of Price and others, on all of which levies had been made by the defendant on the aforesaid property of Brownrigg, subsequently to the levies so made by him on the executions of the said Gray Little, to-wit, on 14 February, 1825; that the property of Brownrigg was accordingly sold under the last levied executions, and no part of the proceeds applied to the payment of the executions, at the instance of Little, which were afterwards, to-wit, on 10 March, 1825, levied by the defendant on the lands of the plaintiff, in the county of Edgecombe, and satisfied by the sale of them, there being no other property of Brownrigg to be found.

Upon the evidence introduced in support of this count, the Judge instructed the jury that if there was a combination between Price and the defendant Petway to postpone the executions of Little, and give the other executions the reference, and thereby throw Little's executions on
(46) the land of Eason, then it would be a fraud upon Eason, and he would be entitled to recover of Petway damages for the injury sustained by the sale of his land; but if there was no such combination, then the action would not lie. The Judge also instructed the jury that whether there was such a combination or not, was a question of fact, which they might infer from the evidence, if they thought it sufficient. The jury returned a verdict for the plaintiff, upon the second count in the declaration, and the defendant appealed.

Badger and *Mordecai*, for the defendant.
Devereux, for the plaintiff.

RUFFIN, C. J. The action cannot be supported upon any idea but the one that the plaintiff, as surety, has the right, as against his principal, to call upon the latter to pay the debt in the first instance; and that the sheriff is bound to

respect that right by levying the debt from the principal, if it can be done, or, at least, can be conveniently done. The Court cannot sanction the latter part of the proposition, but deems it altogether untenable. We think it settled law that all defendants, when once fixed by judgment, are equally the debtors, and together make but one debtor. No difference in the order of their liability is recognized at law, in respect to any proceedings upon process on the judgment. *Ex-parte King,* 13 N. C., 341; *Benford v. Alston,* 15 N. C., 351. The relation between principal and surety creates rights and duties among the defendants, as between themselves; but it does not affect third persons. The sheriff may levy the debt from either defendant, or in such proportions as he chooses. *Harrington v. Wood,* 9 Mass., 251. *Hill v. Child,* 14 N. C., 265. This rule is sustained by legislative authority in the recent act, which makes it the duty of the sheriff not to distrain the estate of the surety, if he can find that of the principal, provided the record and process show those parties to stand in that relation. It cannot, therefore, in legal contemplation, be an injury to the present plaintiff to have made him pay a debt in the first instance, which he was under a direct and primary legal liability thus to (47) pay.

The seizure of Brownrigg's estate did not oblige the sheriff to the plaintiff, in this suit to proceed on that seizure. It did so oblige him, as between him and the creditor, in that execution; indeed, he was equally bound to the creditor, whether he had levied or not, provided either defendant had sufficient property. But neither defendant was discharged by the seizure, since the property was restored, or otherwise appropriated to the use of the owner, and the present plaintiff cannot complain of the acts of the sheriff, since they are all within the mandates of the writ, and justified by it, without reference to his motives. The opinion in the Superior Court seems to assume these positions as correct, and is founded upon a supposed fraudulent combination between the defendant and another. It does not appear to us that the alleged combination can make a difference. It may be admitted that it was an unlawful conspiracy, for which the parties might be indicted. It is frequently criminal for many to combine to effect even a lawful end. It is doing a lawful

thing by unlawful means. But that offense is to the public. A private person cannot complain of the conspiracy as such; but only when it operates to his injury, that is to say, when as to him the object of the conspiracy is unlawful. There must, in the terms used in the Superior Court, be "a fraudulent combination." Here none such could exist, because the purpose alleged and complained of, by the plaintiff, was only to make him pay the debt, instead of his principal, and that was not an unlawful, but a lawful intent or act, and therefore not a fraudulent one.

PER CURIAM. Judgment reversed.

Cited: Stewart v. Ray, 26 N. C., 272; *Smith v. McLeod,* 38 N. C., 398; *Bevis v. Landis,* 59 N. C., 314; *Gatewood v. Burns,* 99 N. C., 360.

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(48)

MARY RICHARDS, admx., etc., v. GUILFORD D. SIMMS.

Where nothing is said or done inconsistent with that inference, if two persons put their names on paper for the accommodation of a third, they are co-securities, and are liable without respect to the apparent legal liabilities arising from the order of their names. Hence, where A procured the endorsement of B and afterwards of C upon a note which he intended to get discounted at bank, it was *held*, that B and C were to be taken as co-sureties, although by agreement between A and B, B was to have part of the proceeds of the note discounted, for which he was to give A his own separate bond, and that agreement was not made known to C at the time of his endorsement.

(*Daniel v. McRae*, 9 N. C., 590, discussed, and followed).

ASSUMPSIT, tried at FRANKLIN, on the last circuit, before his Honor, *Judge Donnell,* in which the plaintiff declared against the defendant for contribution, as the co-security with her intestate, for one Thomas Yarbrough. On the trial it appeared that in 1826 Yarbrough was indebted to the State Bank in the sum of four hundred and eighty dollars, one Kearney and Davis being his sureties, and that Major Richards, the intestate of the plaintiff, was also indebted to the bank in the sum of one hundred dollars, secured by Yarbrough. It was agreed by Yarbrough and Richards (as

the bank would not renew notes for less than one hundred dollars) to put in a note for a sum sufficient to cover both debts, that so much of the proceeds as should be necessary should be applied to the discharge of Richards' debt and the balance to the renewal of Yarbrough's note; that Richards should, upon future renewals, pay his proportional share of the payments required by the bank, and should give Yarbrough his own bond for the amount of his debt, discharged by the proceeds of the new note. A note was accordingly prepared for five hundred and eighty dollars, and endorsed by Richards, and the defendant at Yarbrough's request also endorsed it, no communication being made to him of the agreement between Richards and Yarbrough or of the application of the proceeds. The note was discounted and the proceeds applied as agreed. Richards gave Yarbrough his bond for the one hundred dollars applied to his benefit, and from time to time made payments towards the (49) renewals, which were endorsed as credits on his bond. Yarbrough afterwards becoming insolvent, Richards was sued, and the whole amount of the note collected out of him. In this action the plaintiff claimed that her intestate and the defendant were, as to so much of the note as was applied to the renewal of Yarbrough's original note, co-securities, and that she was entitled to receive for contribution a moiety thereof.

Under the instructions of his Honor, who ruled that this case fell within the principle of the case of *Daniel v. McRae,* 9 N. C., 590, a verdict was rendered for the plaintiff and the defendant appealed.

W. H. Haywood and *Badger,* for the defendant.
Saunders, contra.

DANIEL, J. In the case of *Daniel v. McRae,* 9 N. C., 590, it was decided that endorsers on accommodation paper for the benefit of a third person, where there is no special agreement between such endorsers, and where neither is benefited, are to be considered as co-securities. That was a case in equity, but if they be co-securities, the courts of law also can give redress. That case has been thought by some of the profession to have been shaken by the decisions in the subsequent

cases of *Smith v. Smith,* 16 N. C., 173, and *Gomez v. Lazarus, Ibid.*, 205. We do not, however, consider the principle established in *Daniel v. McRae,* at all impugned by the decisions in those cases. In *Smith v. Smith,* Helme and E. Smith executed a promissory note to B. Smith, and on the note being carried to him by Helme, he endorsed it. The signatures of E. Smith and B. Smith were both in fact voluntary, and for the accommodation of Helme, who procured the note to be discounted at bank. The endorser admitted that he endorsed it at the request of Helme, and that he had no knowledge that E. Smith was a surety, but that he then believed that E. Smith had a joint interest with Helme in having the note discounted. Helme, at the time of the endorsement, told the endorser that E. Smith was bound to indemnify him, if he, Helme, failed. This case is,
(50) therefore, plainly distinguishable from that of *Daniel v. McRae.* In *Gomez v. Lazarus,* the inference of a co-suretyship between Gomez and Clarke, from the circumstance that they respectively accepted and endorsed for the accommodation of Levy, was considered by the Court as repelled by the special terms of the bond and first mortgage to Clarke. They were for his separate and particular indemnity, and not for the security of the debts generally. This was thought to establish an understanding that Clarke and Gomez were to be responsible according to their legal liabilities from the order in which their names appeared, since Clarke's taking a security against loss to himself alone *as endorser* indicated that he could not be subjected to loss in any other character. The inquiry is not now whether that construction was the proper one, but whether that decision, assuming it to be on the ground mentioned, is at points with the previous case of *Daniel v. McRae.* That such was the construction is quite plain from the reasoning of *Judge Henderson,* and especially from that part of it which limits the operation of the general words in the second deed to Lazarus and McRae, by the reference to the former mortgage to Clarke. The liability of Clarke as *endorser,* necessarily converted the liability of Gomez as *acceptor* into the prior one; and therefore it was held to amount to a declaration that those persons should *not* be co-securities. Whether this was right or wrong, it left *Daniel v. McRae* unaffected in its principle,

which is, that where nothing is said or done inconsistent with that inference, if two persons put their names on paper for the accommodation of a third person, they are co-securities, and are liable without respect to the apparent legal liabilities arising from the order of their names. That the integrity of the case of *Daniel v. McRae* was not intended to be impeached is clear from the subsequent observations of the same Judges who pronounced the opinion in that case. In *Hatcher v. McMorine,* 14 N. C., 228, *Judge Henderson* says he is very far from being satisfied that the case of *Daniel v. McRae* is wrong.

Accommodation paper was almost unknown in this State previous to the establishment of our banks. Since that period most of the business done in the banks has (51) been transacted upon paper of that description. And the principle laid down in the case of *Daniel v. McRae* has been so generally understood in this State to be the law governing in the case of endorsements and sureties on accommodation paper, that this Court feels itself now under an imperative obligation to follow it as the established law. But we unanimously take this occasion to remark that were it *res integra,* we could not sanction the principle. We should say, as has been said by the rest of the mercantile world, that the parties to accommodation paper were to be governed by the same rules as parties are governed whose names are on other or business paper. *Fentum v. Pocock,* 5 Taunt., 192; *Murry v. Judah,* 6 Cowen, 484; 3 Kent Com., 86. The counsel for the defendant contends that if *Daniel v. McRae* be law, this case is not within its principle; that Richards must be conered a principal, and not a surety. We do not think so. The money which Richards received must be taken as a loan from Yarbrough, for which Richards gave his separate note to secure the repayment. The note for five hundred and eighty dollars which Yarbrough drew, and which was endorsed, first by Richards, and then taken by Yarbrough to the defendant for his endorsement, was evidence to the defendant that it was only for the accommodation of the drawer; and that they, Richards and the defendant, were to be considered only as endorsers without any benefit in the avails of the said note after it should be discounted at bank. We think the Court

was right in deciding that this case was governed by *Daniel v. McRae,* and, therefore, that the plaintiff was entitled to recover.

PER CURIAM. Judgment affirmed.

Cited: Dawson v. Pettway, 20 N. C., 534.

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(52)

AARON CAMP v. FRANCIS S. COXE.

1. A sale of the equity of redemption under an execution at law, at the instance of the mortgagee, for his mortgage debt, is not sanctioned by the Act of 1812 (ch. 830). The words of that act are general, but this exception arises necessarily out of the subject, and the spirit of the act.

2. Whether the act would justify a sale by the mortgagee for any other deft, *quære?*

SCIRE FACIAS to revive a judgment, and the question arose on the pleas of payment and satisfaction.

On the trial at RUTHERFORD, on the last Spring Circuit, before his Honor, *Judge Seawell,* the evidence offered by the defendant was that he had purchased of the plaintiff a tract of land, for eight hundred dollars, and paid him one-half of the purchase money, and to secure the balance had executed a bond and mortgage of the land purchased; that a suit had been instituted by the plaintiff upon the bond, judgment obtained, and execution issued and levied upon the defendant's equity of redemption in the land; that at a sale under this execution the sheriff gave notice that he offered the land for sale subject to the plaintiff's mortgage, and that the plaintiff became the purchaser for the sum of three hundred and four dollars. Upon these facts his Honor was requested, on behalf of the defendant, to instruct the jury that the judgment was fully paid and satisfied. This he declined doing, but informed them that the facts proved amounted to payment and satisfaction only *pro tanto,* viz., the amount of the plaintiff's bid. The jury rendered a verdict for the plaintiff for the balance due upon the judgment, and the defendant appealed.

Devereux, for the defendant.
Badger, contra.

RUFFIN, C. J. The defendant raises in this case the same questions which he did, as plaintiff, in the suit which was formerly here. *Coxe v. Camp,* 13 N. C., 502. As that case is thus brought to my notice, I avail myself of the occasion to correct an inaccuracy in the printed report which gives to what I said quite a different meaning from (53) that really expressed. I am made to "regret" that there was no contract between the parties, and that, for that reason, the action could not be sustained: whereas, my words were, "I agree" that there is no contract—speaking in reference to the previous opinion of the Chief Justice on that point, and intending to concur in it. I certainly did not mean to intimate that the plaintiff had the legal right of the case, if he could get at it; for my opinion has always inclined against the construction of the statute on which that action was founded.

Since that case, and indeed long before, various questions that may arise on the Act of 1812 (Rev., ch. 830), and among them this which has arisen, presented themselves to the minds of most professional men. The members of the Court are no strangers to them; and after much consideration, concur unanimously in the opinion that the facts stated in the record do not constitute a defense at law, and, indeed, that the Act of 1812 does not authorize such a sale of an equity of redemption upon any construction that can be put upon it by a court of law, or be admitted to be just by a court of equity.

According to the words of the statute, the lands mortgaged are not to be sold, but the equity of redemption in them. The argument is, that when the mortgagee sells for the very debt secured by the mortgage, that debt is necessarily extinguished; because the price given must be so much over and above the mortgage debt, since the thing sold is the interest of the debtor in the land, over and above that debt. This argument assumes that such a sale is within the act, and, in its application to this case, that a court of law can administer the act in its proper operation on the equitable rights of the parties. We deem both assumptions unauthorized.

The Court has been always perfectly aware of the serious evils and the heavy oppressions to the distressed which such a construction would tend to produce, and indeed would infallibly produce; and there was consequently a natural reluctance to adopt it. But the general words of the statute certainly embrace all equities of redemption, and (54) there is a yet greater reluctance felt by all Judges to admit restriction upon such general terms, if no restriction be found in the statute itself. From this cause has arisen our whole difficulty. Upon full consideration, however, it seems to us that a limitation arises out of the act itself, and from the nature of the subject, as plainly as if it were expressed in so many words, excluding a sale by the mortgagee for the debt secured by the mortgage.

The statute does not, in the second and third sections, operate, as in the first, to disturb the legal estate. In the case of a trust, the sale is of the land itself, as if the seizin was in the *cestui que trust*, and the seizin of the trustee is divested, and transferred to the purchaser. In the case of a mortgage, the land is not sold, but only the equity, as an equity. After the sale, the legal title is supposed to remain as it was before, and the equity to subsist independently, as distinct from the freehold. The nature of the interest sold is not changed by the sale, speaking of it as a legal or equitable interest, as contradistinguished from each other. The only change in that respect is simply to make an equity, as such, subject to legal process for the benefit of the owner's creditors. But the rights of the mortgagor, mortgagee, and purchaser, as against each other, in respect of the former or present ownership of the equity of redemption, are purely equitable, and consequently their relief must be equitable. For these reasons, the statute is most properly to receive its interpretation from the Court of Equity; which, upon its own principles must determine in what cases there is an equitable interest susceptible of sale, and what effect will be allowed there to a sale by execution between parties standing in the relation these do. Upon the known and clearest principles of equity such a sale is forbidden; and the question is, whether that court must understand the Legislature as abrogating those principles by using general terms, when a particular purpose, comparatively consistent with those principles, was, obviously and alone, to be effected.

Before proceeding to take that view of the subject, it may be proper to take the narrower one, to which a court of law is competent. From the nature of an equity of redemption, although nothing at all in the eye of the com- (55) mon law, it is in equity the estate, and the value of it is measured by the value of both the legal and equitable rights, deducting the debt secured by the mortgage. It is said a court of law must take notice of it, not only as a thing salable, but also understand its nature, and measure its value; and, consequently, that the whole price obtained for it, by a sale under execution for the mortgage debt, belongs to the mortgagor. If the premises be correct, the whole proposition must be so; for the conclusion seems rationally to follow. But the necessity for such an inference, and its absurdity when drawn, prove that there must be a fallacy in the premises. The proposition supposes the law to authorize, in this case, a sale under a *fieri facias,* without satisfying, and without the possibility of satisfying, any part of the debt in execution, for the thing is sold subject still to the payment of the whole of that debt. The sum levied is thus to be returned immediately to the person from whom it was levied; or, if necessarily applied to the execution, that person is to have an immediate legal right to demand the same sum from the plaintiff or the purchaser. This is a *reductio ad absurdum,* which refutes the argument. Such an idle and ridiculous futility would be altogether unworthy of the Legislature. The nature of the writ of *fieri facias* was well understood by the Assembly. It is an essential attribute of it that the money raised on it is in satisfaction of the debt and is either to be paid to the plaintiff or brought into court as his money. Unless the money be applicable to the debt, the writ gives no authority to sell. On its face, it is to satisfy the plaintiff; and whenever that has been done, no further sale can be made. So in a case where a sale *cannot* have that effect, there cannot be a sale at all. If, therefore, from the beginning, the plaintiff was to have none of the money arising from this sale, from the beginning also there was no power to sell.

If then, from the nature of an equity of redemption, the proceeds of the sale of it cannot, or ought not to be applied, in the particular case, to the execution debt, the proper infer-

ence is, not that the statute alters the nature of the
(56) writ, and abrogates its ordinary uses, but, rather, that such a case is wholly out of the act; not that the money raised, if properly raised, shall not go to the plaintiff, or that he, by the act of receiving it, becomes reciprocally indebted to his debtor in an equal sum; but that the interest sold is not legally the subject of sale.

If it were, a court of law could not adjust the claims of the parties. This case states, indeed, that the judgment was for the mortgage debt. But how can that be ascertained at law? It is not stated as a fact agreed; though if it were agreed, it could not alter the jurisdiction. It is stated as a fact proved. Now, it is incapable of proof. In this particular instance, the mortgagor may know that he is not entitled to any equitable deductions, and that the judgment debt is the real debt. But if the mortgagee had taken possession, and received the profits, no credit could be given for them; because in a court of law the land belongs to the mortgagee; and the judgment would be according to the bond. If, on the trial, the Court was incompetent to take those accounts, the sale under execution does not render it less so. At law no deductions can now be made, except for the money produced by the sale, without contradicting the record and making it incongruous on its face. Besides, the mortgagee may have been at expense in getting into possession, or paid taxes, or made other advances upon an agreement to tack, or have other judgments which can be tacked without agreement; of none of which can notice be taken at law.

If, indeed, the effect of the statute were to deprive the defendant of relief in equity, those inquiries would necessarily be gone into at law; for there must be a remedy for every wrong. But a court of equity is the proper tribunal to determine what effect a sale like this is to have, as well since the statute as before. In that court, we think it clear, it must be held to have no effect, upon any construction which can be there put on the statute.

The absurd anomaly, arising out of such a sale, from the necessity at law of applying the money to the execution for the mortgage debt goes far to show that the Legislature did not observe that the case came within their words.

That the sale should cause an immediate necessity for (57) the parties to resort to a court of equity to correct an injustice by that very act of sale, and yet that such a sale should be intended, is not credible.

But it is very clear to the Court that the situation of a mortgagee is not within the mischief intended to be remedied. The object of the act is not to foreclose mortgages, and make them more effectual as securities to the mortgagee, but to subject the equitable interest of the mortgagor to the satisfaction of those of his creditors who could not before get a security on the premises. Authorizing a sale of an equity of redemption implies that the thing pledged is worth more than the debt; and the act of making such a pledge, and thereby withdrawing the thing from execution, is regarded, in a degree, as a species of fraud on the general creditors, whose executions are thereby hindered. For such creditors the provisions must, at least in the main, have been meant. Unless for cases of that sort, can it be supposed the act would have been passed at all? The mortgagee is not an object of that policy. He has, of his own provision, a distinct, specific and adequate security. It is to be remembered that he does not sell the land, but the right in equity to redeem. Why should he be allowed to extinguish that right, instead of proceeding on his security? How can he sell it, if less than the debt be bid? For in that case, if the money is to be applied to the execution, the mortgagor gets nothing for the equity; and there can be no sale without a price. But if more is given, it is still the price of the equity, and the mortgagor may look either to the creditor or the land to reimburse to him the whole of it; and necessarily that demand, and an account of the mortgage debt, is to form the subject of litigation in a court of chancery. Upon the idea that the sale is valid, the only relief to the mortgagor would be a decree for the money, the mortgage being foreclosed. But, as has been already said, the statute looks to a different state of things. It supposes the equity of redemption to be *assigned* by the sale, and not *extinguished*. We do not say that a mortgagee may not buy at a sale by another creditor. Indeed, we take it for granted that he may; although the effect is to unite the legal and equitable estates, and thereby (58) merge the latter. That is a consequence of dealings

within both the words and spirit of the statute, and, whatever hardships may grow out of them, they must be borne, if there be no fraud or actual oppression. It may be also that the mortgagee may sell for any other debt except that secured by the mortgage; but that is not entirely clear. His knowledge of the encumbrance, and the ignorance of others, would afford a strong temptation to sell oppressively, that he might buy the *estate* at a sacrifice; and the relation of the parties forbids the making an advantage, for the very reason that it affords the opportunity for making it. It is true the act extends to such a case; but it is a principle of equity to restrain or relieve the iniquitous use of the most undoubted legal right; and it is one of its first principles, in all cases of sales, to ascertain previously what is the actual interest to be sold, that the competition may be fair, and an adequate price had. Upon that ground, a sale under execution against one partner is enjoined, until an account be taken and his separate interest shown. Perhaps for this reason, the second section of the statute will be found to be practically impolitic throughout, and it would be better to apply in the first instance to a court of equity to redeem, or to sell the estate; and that, at any rate, it will be the duty of the Court to treat a purchase by the mortgagee at an under value as a further advance of money on the security of the estate. But upon those points the present question does not call for an opinion; and it is not intended to express any. They are alluded to only for the purpose of showing that, if two opinions can be entertained upon them, a most cogent argument arises against a construction that a sale may be made at law for the mortgage debt. It would not only open the door for oppression, and invite to it, but such a sale is in every case *against the contract of the parties*, as understood in a court of equity. That court relieves even against agreements, between persons in a fiduciary relation, upon a principle of policy, to prevent frauds; much more ought it to protect one person, in the power of another, from loss by the use of a legal advantage, contrary to the agreement. The contract here was
(59) that the mortgagee might redeem. Will the Court allow the mortgagor to cut him off from that equity at short hand? Such a position cannot be tolerated, nor could the Legislature have intended it. The act did not mean

to interfere with the stipulations of the parties, as they might affect them, either at law or in equity. It designed to prevent a mischief to other persons who were strangers to those stipulations. A sale for a debt uncertain in its amount, and upon which a clear legal title is not passed to any bidder but the mortgagee himself, *must* be in every case a disadvantageous sale; such an one as a mortgagee ought not to make. If he is not satisfied with his security, the mortgagor's person and other property are open to him. Let him resort to them; but against the estate on which he has taken a security he ought not to act, but upon the footing of that security, and according to its terms in their established sense.

Many cases might be stated as strong instances of the bad faith of such a course. There is an act passed in 1822 (Taylor's Rev., ch. 1172) which is a part of this system, and to be considered in connection with the Act of 1812. By it the legal right of redemption may be sold; that is to say, the right of paying the debt before a forfeiture. Suppose a debt due upon several bonds payable on different days, and the whole secured by a mortgage, in which the day of payment is that on which the last bond falls due. Is it possible that the creditor can foreclose by execution for the debt in the first bond, before the others become payable? It cannot be supposed the debtor would have given a mortgage with a shorter day of payment; and yet the creditor would defeat him in the very point which formed the inducement to the deed.

The confusion, too, in which the Court would be involved would be inextricable. In the case just stated, suppose upon the judgment for a part of the mortgage debt a sale of a part of the mortgaged property. By what rule is the burden on the respective parts to be adjusted? Upon what principle is the redemption of the one part to be refused and the other decreed? Or, however large the property, must the whole equity of redemption, as an entire thing, be (60) sold for a trifling debt, and thus aggravate the hardships to the utmost extent?

But it may be said, third persons may purchase, and be deceived. Such a purchase, at a sale purporting to be of the land, and without notice of the mortgage, stands on its own distinct equity. At a sale, under the statute, that is, of the equity of redemption, there can be no want of notice; and the

purchaser must take care to inquire for the evidences of the debt. At all events, the injury could not be great, for the land would at least be a security for his purchase money.

These reasons force the conviction on our minds that a sale by the mortgagee, for the debt secured by mortgage, can derive no sanction from the statutes. The cases within its purview are those in which the application of the money raised upon the execution, to that debt (as is necessarily the case at law) does not of itself alter the encumbrance, and thereby render the equity of redemption more valuable than it was, the instant before, at the sale. This cannot be avoided, unless by treating such a sale as substantially one of the land itself, which none can pretend the statute allows. We think, in fine, that the act is to be read as if such sales by the mortgagee were expressly excepted.

Consequently the defendant has paid nothing, much less the whole debt. The payment, which, at law, has been apparently made, will be treated properly when he shall apply for redemption to that tribunal which can strip the case of its formal legal vestments and administer exact justice according to real rights which can there be seen.

It is gratifying to be confirmed in the conclusion arrived at upon general principles applied to the provisions of the statute, by an adjudged case in point, which has been since found. In *Atkins v. Sawyer,* 1 Pick., 351, the Supreme Court of Massachusetts held, upon a similar statute, that for the debt secured by mortgage the mortgagee could not sell the equity of redemption, although another creditor might, and also the mortgagee for another debt. To a bill for redemption the sale and statute were pleaded, but the plea was
(61) overruled, and the mortgagor let in to redeem.

PER CURIAM. Judgment affirmed.

Cited: S. v. Pool, 27 N. C., 108; *Deaver v. Parker,* 37 N. C., 45; *Melton v. Davidson,* 41 N. C., 196; *Thompson v. Parker,* 55 N. C., 477; *Schoffner v. Fogleman,* 60 N. C., 569; *Mitchell v. Wood,* 70 N. C., 299; *Barnes v. Brown,* 71 N. C., 510; *Myrover v. French,* 73 N. C., 611; *Rollins v. Henry,* 86 N. C., 715; *Simpson v. Simpson,* 93 N. C., 377.

JOSEPH WILLIAMS v. WINSTON SOMERS.

Where a person had been elected Clerk of the Superior Court, under the Act of 1832, ch. 2, and at the proper time had tendered his bonds, which had been accepted by the Court, and he inducted into office, while the former Clerk was present in Court, cognizant of what was going on, and did not object thereto, but actually surrendered up the office and records to the new Clerk in term time, and retired from the performance of the duties of the office for twelve months thereafter. It was *held*, that such conduct in the old Clerk amounted to a surrender of his office to the Court, and justified the reception and induction into office of the newly elected Clerk.

AT SURRY, on the last circuit, before his Honor, *Judge Martin,* the plaintiff filed an information, in the name of the Attorney-General, in the nature of a *quo warranto,* founded upon the following affidavit:

STATE OF NORTH CAROLINA—Surry County.

Superior Court of Law, September Term, 1834.

The affidavit of Joseph Williams, who states that he was duly appointed Clerk of the Superior Court of Law for the county of Surry aforesaid, at the March Term of the said Court in the year 1807; that he properly qualified and gave bond and security for the discharge of his official duties as required by law, and that he has regularly given bond and security agreeably to the provisions of the various acts of Assembly, from that time up to March Term, 1834; that in 1832 the Legislature of North Carolina passed a law changing the mode of electing the clerks of the several Superior and County Courts within this State, and vesting the same in the free white men entitled to vote for members of the House of Commons of the General Assembly; that under that law an election was held in the county of Surry, on the second Thursday in August, 1833, and he supposes the sheriff returned that one Winston Somers was duly elected; that at the September Term of the said Superior Court (62) thereafter, while the official bonds of this affiant were were in full full force and effect, the said Winston Somers appeared in court, and usurped and took upon himself the discharge of the duties of the Clerk of the Superior Court

aforesaid, thereby ejecting this affiant from the said office, to his great oppression and damage, and in utter disregard of the established laws of the land. This affiant further states that at the time the said Somers took possession of the books, papers and records of the said office, he (this affiant) stated to him (the said Somers) that he did not resign his office as clerk of the said Superior Court, and that if the Act of 1832, ch. 2, was decided to be unconstitutional, he should contend for his office, together with all the fees that had accrued in the meantime.

JO. WILLIAMS.

Sworn to before the Honorable
JAMES MARTIN, *Judge.*

To this information Winston Somers filed the following pleas: "Defendant by way of plea to the application of Joseph Williams to be reinstated in the office of Clerk of the Superior Court of said county saith, that he did not usurp and take upon himself the discharge of the duties of said office contrary to law, nor in anywise eject the said Joseph from the same; that under the Act of 1832, prescribing the method of electing the clerks of the Superior and County Courts in this State, the said Joseph Williams and defendant became candidates for the office aforesaid, and so continued up to the election in August, 1833, when defendant obtained a majority of the votes duly given at the said election, and was declared elected by the proper authority; and during the canvass the said Joseph declared he would abide and be content with the decision of the people, and so expressed himself after the contest. That at September Term of this Court next after the election aforesaid, defendant appeared in court, tendered the bonds required by law to the presiding Judge, by whom they were accepted, and before whom they were proved, whereupon he took the necessary oaths of office, all which will appear by reference to the records of said court, and
(63) to all which proceeding the said Joseph made no opposition, though then present in court; and further, that on Monday of September Term aforesaid, after defendant had tendered his bonds, the said Joseph called on defendant, took him into the clerk's office in the court-house, surrendered to him the books and papers appertaining to said office, and

took a receipt from defendant for the same, in the following words and figures: 'Surry County, 2 September, 1833, I, Winston Somers, have received all the papers that are in the Superior Court office at this time from Joseph Williams, late clerk—W. Somers,' the body of which receipt is in the proper handwriting of the said Joseph; that defendant hath continued without molestation to hold said office, and with fidelity discharged the duties of the same from the time aforesaid up to this time; that he hath paid fees to the said Joseph, and the said Joseph hath recognized defendant as clerk of said court, by signing a receipt to him in that character, and therefore, defendant pleads that the said Joseph hath surrendered, resigned and vacated said office, and he prays, etc. For further plea defendant states that the clerks of the several courts in this State are bound annually to execute and tender the several bonds by law required to the presiding Judge, and that the said Joseph hath not complied with the law in such case provided, whereby and by virtue of an act in such cases made, he hath forfeited said office, and defendant prays," etc.

To this plea the plaintiff demurred, which his Honor *pro forma*, sustained, overruled the plea and adjudged that the defendant be removed from office and the plaintiff be reinstated, whereupon the defendant appealed.

Devereux, for the defendant.
Badger, contra.

RUFFIN, C. J. The attention of the Court was not called by the counsel to the form in which this proceeding is brought forward; and thence it is supposed that the object of the parties is to obtain a decision upon the merits of the controversy. The Court will therefore proceed to consider the merits: premising only, that it must not be inferred (64) therefrom that the particular remedy adopted in this case is either approved or disapproved here.

By the general demurrer, the matters of fact set forth in the plea are admitted to be true. In the opinion of the Court, those facts do amount fully to a vacating of the office of clerk by Mr. Williams. Reliance is not much placed on the transactions between that gentleman and Mr. Somers in private;

for the old clerk could not by his own act merely, confer a right on another, to an office concerning the administration of the law. But as the office is of that character, and as the discharge of the duties by the officer himself, or through a deputy in term time, was indispensable to the dispatch of business, the withdrawal of Mr. Williams from the discharge of those duties, and the withholding from the knowledge of the Court all claim to the office itself, fully warranted the Court to admit another person. The mere absence from court at a particular time would not authorize a judgment of a motion; nor could another person be appointed and inducted fully into office upon the score of his predecessor's misdemeanor in office without such a judgment. But as this gentleman was personally present, and cognizant of what was going on, and that a new clerk was about being admitted, and his admission stated of record as an induction generally into the office, his silence is a tacit approbation of the act of the Court; and if that act be otherwise unwarranted, it is confirmed and rendered valid as against him, by and upon his own consent. The abandonment of the office is, at all events, conclusively to be inferred from those facts, in connection with the subsequent failure to give or tender official bonds. That failure might not prejudice a person removed by a decision of the Court against his will, and upon objection made, although by statute the failure to renew his bonds is a forfeiture of office. That must mean a person who is *de facto* clerk, because from such only is a security useful, and one cannot be required to tender bonds as clerk to a court which denies that he is clerk, and therefore would not and could not make his bond. But that circumstance
(65) is of force here, as it gives a character to the conduct of the party himself, in the first instance. If he had urged to the Court his right, as he says he reserved it in the surrender to the defendant, his situation would be entirely different, no matter what disposition the Court had made to his objection. A removal of him, either by an express order or by implication from the admission of another, would have been unlawful and wrongful; and he would be entitled to restoration. But after declining in open court, and not at the instance of the Court, to act in the office; after seeing without objection the Court confer on another the same office,

which the interests of the public essentially required to be filled by some person; after delivering up the office and records in term time to the person thus appointed; and after a non-user of the office for twelve months next succeeding; it is too late now to say that he did not yield it up to the public, there represented by the Court. The judgment of the Superior Court is therefore reversed, and judgment for the defendant on the plea and demurrer.

PER CURIAM. Judgment reversed.

Cited: Dickens v. Justices, post., 408; *Culver v. Eggers,* 63 N. C., 631; *Loftin v. Sowers,* 65 N. C., 255; *Ward v. Elizabeth City,* 121 N. C., 4.

DEN ex dem. DARLING BELK et al. v. JOHN B. LOVE.

1. Where the subject-matter of a conveyance is completely identified by its name, by its localities, and by certain other marks of description, the addition of another particular which does not apply to it, nor to anything else, will not avoid the conveyance, but will be rejected as having been inserted through misapprehension or inadvertence.

2. Under the third article of the Treaty of 1819, between the United States and the Cherokee Indians, the particular Indians, residing within the limits of North Carolina, to whom reservations in fee simple were made, had a right to alienate the tracts reserved as they thought proper, prior to, and independent of, any act of the State Legislature.

3. The condition annexed to the reservations under this article does not require a perpetual residence on the tracts reserved, but only a notification of an *intent* to reside, which is a condition precedent, and when complied with, the estate becomes absolute.

4. But if this were otherwise, an individual could not treat the estate as at an end, before the State shall enforce a forfeiture for the breach of the condition.

EJECTMENT for a tract of land in Haywood County, tried before his Honor, *Judge Martin,* at BURKE, on (66) the last circuit. The plaintiff produced in evidence a deed from Yonah, *alias* Big Bear, to the ancestor of the lessors, dated 1 November, 1819, which was in fact, according

to the testimony of the subscribing witness, executed and delivered 1 November, 1820. They also proved that Yonah was a Cherokee Indian, mentioned in the treaty of 27 February, 1819, as entitled to a reservation; and produced a survey, plat and certificate of the land mentioned in the declaration, made in pursuance of the treaty in May, 1820. They also produced a deed from Yonah to the defendant, dated 8 September, 1824, covering the same lands, and proved the defendant to be in possession thereof, and that in 1825-'26 Yonah died without heirs. The deed under which the plaintiffs claimed, after reciting "that a reservation in fee simple of six hundred and forty acres of land was allotted and reserved to the said Yonah, *alias* Big Bear, as a perpetual inheritance, including his improvements, whereon he now lives and has resided for some time past; situate, lying and being on both sides of Tuckaseejah River, and including an old town called Tuckaleechy," conveys "the aforesaid reservation of six hundred and forty acres of land, situate as aforesaid, hereafter to be laid off, and ran and marked according to the provisions and stipulations of said treaty, with the appurtenances and hereditaments thereunto belonging and appertaining, with all and singular the right, title, interest, property, claim and demand whatsoever of him, the said Yonah, *alias* Big Bear, as well from his original right of inheritance of perpetual occupancy as one of the chiefs of his nation, as his right acquired from the United States by the reservation aforesaid." The defendant objected that the description in the deed to the ancestor of the plaintiff's lessors was vague, uncertain and insufficient to pass the title of the land set forth in the declaration, and that this defect could not be supplied or explained; but his Honor overruled the objection. He then objected that before the Act of 1820 (Rev., ch. 1062) Yonah had no right to sell his reservation in fee simple, and that no title passed by the deed to
(67) the ancestor of the plaintiff's lessors. This objection was also overruled, and a verdict being found for the plaintiff, the defendant appealed.

Pearson, for the defendant.
Badger, contra.

GASTON, J. The appellant in this case contends that the judgment below should be reversed and a *venire de novo* awarded because of error in the Judge in overruling certain legal objections taken on the trial to the title of the lessors of the plaintiff. These objections are, first, that the description in the deed of Yonah, or the Big Bear, to the ancestor of the lessors was vague, uncertain and insufficient to pass the land described in the declaration, and that this defect could not be supplied nor explained; secondly, that at the time of the delivery of the said deed Yonah had no right to sell in fee simple, and that no title passed thereby. To enable us to form a correct judgment upon these alleged errors, it is necessary to examine the stipulations of the treaty between the United States and the Cherokees affecting the land in question, the proceedings under the treaty on the part of Yonah and the officers of the United States, and the acts of our State Legislature in relation to the subject-matter of the treaty.

Previously to 27 February, 1819, the tract of land which is the subject of the present controversy, with a large territory around it, was a part of the domain of North Carolina, subject, however, to the right of the Cherokee Nation to occupy and enjoy it. On that day articles of convention were agreed upon between the Secretary of War, acting on the part of the President of the United States, and certain chiefs and headmen of the nation; which articles of convention were submitted to the Senate of the United States, as a treaty, and on 10 March, 1819, were, with the advice and consent of the Senate, accepted, ratified and confirmed by the President. By the first article of this treaty the Cherokee Nation cedes to the United States all their lands, lying north and east of a certain line, which *takes in* this territory. By the second article the United States agree to pay, according to the stipulation of a former treaty of 8 (68) July, 1817, for all improvements on the land lying within the ceded country, which add real value to the land; and do agree also to allow a reservation of six hundred and forty acres to each head of any Indian family, residing within the ceded territory (those who enrolled themselves for removal to the Arkansas excepted), who chose to become citi-

zens of the United States in the manner stipulated in the treaty of July, 1817.

By the third article it is declared as follows: "It is also understood and agreed by the contracting parties that a *reservation in fee simple* of 640 acres *square* (with the exception of Major Walker's, which is to be located as hereinafter directed), to include their improvements, and which are to be as near the center thereof as possible, shall be made to each of the persons whose names are inscribed in the certified list annexed to this treaty, all of whom are believed to be persons of industry, and capable of managing their property with discretion, and have with few exceptions made considerable improvements on the tracts reserved. The reservations are made on the condition that those for whom they are intended shall notify in writing to the agent for the Cherokee Nation, within six months after the ratification of this treaty, that it is their intention to reside permanently on the land reserved."

Among the persons whose names are inscribed on the list annexed to the treaty are "Yonah, or Big Bear," and "Richard Walker," and these are the only ones residing within the limits of this State. On 16 May, 1820, the commissioner and surveyor made out and issued to Yonah a proper certificate of survey of his reservation of 640 acres, corresponding with the definite metes and boundaries of the tract set forth in the declaration. By a deed of bargain and sale, bearing date 1 November, 1819, but delivered 1 November, 1820, Yonah conveyed, or pretended to convey, in fee simple to the ancestor of the plaintiff's lessors, "a reservation in fee simple of 640 acres of land, allotted and reserved to the said Yonah, by treaty between the United States and the Cherokee
(69) Nation, as a perpetual inheritance, including his improvements, whereon he now lives, and has resided for some time past, situate, lying and being on both sides of Tuckaseejah River, and including an old town called Tuckaleechy;—the aforesaid reservation of 640 acres of land situate as aforesaid, hereafter to be laid off, and run and marked according to the provisions and stipulations of said treaty, with the appurtenances and hereditaments thereunto belonging, and all and singular the right, title, interest and property of him, the said Yonah, as well from his original right of inheritance of perpetual occupancy as one of the chiefs of

said nation, as his right acquired from the United States, by the reservation aforesaid." On 8 September, 1824, Yonah, by deed of bargain and sale conveyed, or pretended to convey, to the defendant the tract of land, according to the metes, marks, and boundaries as set forth in the certificate of survey, and in 1825 or 1826 he died and left no heirs. At the first session of the Legislature of North Carolina, after the treaty, held in the winter of 1819, an act was passed, providing for the survey and sale of the lands recently acquired by treaty from the Cherokee Nation. In this act nothing is said with respect to the reservations. In the winter of 1820 an act was passed authorizing the sale of so much of the lands lately acquired by treaty from the Cherokee Indians as have been surveyed, and remain unsold; and at the same session another act, whereby it was declared "that it shall not be lawful for any white man to buy, rent, lease or cultivate any of the lands reserved to the Cherokee Indians by the late treaties in 1817 and 1819, nor to act as agent, attorney, or trustee, in buying, renting, leasing, or cultivating such lands, and any persons violating the provisions of this act shall forfeit $500, to be recovered in any court having cognizance of the same, the one-half to any person suing for the same, and the other half to the State; provided, nevertheless, that this act shall not extend, or be construed so as to prevent Richard Walker and Big Bear from managing the lands allotted to them, as they think proper." In 1821 the Legislature passed an act exempting from the restrictions and penalties of the preceding act, persons who have purchased from the State lands reserved for Cherokee Indians, and who (70) have bought out or may buy out the right of the Indians thereto; and also another act authorizing further sales, and directing the commissioner for that purpose appointed to ascertain and report to the treasurer the sections of land in dispute between Indians claiming under the treaties and persons who have purchased from the State; ordering the treasurer thereupon to forbear from collecting the bonds of such purchasers until the controversy shall be decided by the proper tribunal, and directing him further to refund the purchase money and interest to such persons as may be ejected by the Indians. In 1823, 1824, 1825, 1826, and 1827 acts were passed appointing commissioners to contract for the

purchase by the State from the Indians of the tracts to which it may be believed they have a good title under the treaty, ratifying certain contracts of purchase made accordingly by the commissioners, giving relief to purchasers from the State when the tracts bought shall appear to have been materially interfered with by Indian reservations, directing that no reservation secured by treaty to any Indian shall be surveyed or sold, and appointing a new commissioner to inquire into the rights of certain tracts claimed by individuals of the Cherokee Nation, under the provisions of the treaties of 1817 and 1819, and authorizing the commissioners to contract for the purchase of such of those tracts as he believes the said Indians have a good title to.

In support of the first objection which was taken below to the plaintiff's recovery, it has been argued here on the part of the appellant, that the deed from Yonah to Belk cannot pass an estate in the *land* described in the survey and declaration in ejectment, in the first place, because it does not purport to convey *that* estate such as it was after it had become definite and complete by the survey, but only his right to a reservation of six hundred and forty acres under the treaty, before that right had become an estate in a particular and defined tract; and secondly, because the land described in that deed does not appear, and could not by the Court be declared to be, the same with that set forth in the sur-
(71) vey and the declaration of ejectment. The Court is of opinion that the first part of this objection cannot be sustained.

It is admitted on all hands that a deed, if it operates at all, must operate upon the subject-matter of it, such as it is at the time of delivery. When this deed was delivered, Yonah, for the purposes of this argument, must be assumed to have been the owner in fee simple of the particular tract of 640 acres described in the survey. The title to this tract he derived primarily from the reservation or grant in his favor contained in the treaty of 1819, and completed by the survey made in pursuance of the treaty. Before the survey he was proprietor of 640 acres to be laid off in a square form, so as to include his improvements in the center. After the survey he was the proprietor of six hundred and forty acres actually laid off in a square, and marked and including his improve-

ments in the center. The general gift or reservation then became a particular gift or reservation. It was still the same reservation, but the same reservation more exactly defined. There existed no reservation nor right to reservation distinct from the reservation thus reduced to certainty. This reservation, with all the right, interest and property of Yonah therein, which must mean all his right, interest and property at the execution of the deed, he bargained and sold by that deed. But it is urged that in describing the reservation, the deed adds, "the aforesaid reservation of 640 acres situate as aforesaid, is *hereafter* to be laid off, and run and marked according to the provisions of the treaty," which additional description is utterly inapplicable to the tract actually laid off and run and marked according to the provisions of the treaty. And it is insisted that although there may be no such reservation as that mentioned in the deed, and the consequence of the construction contended for is to deprive the deed of all operation, this consideration will not cause a thing to pass by the deed which that deed did not profess nor purport to pass. As this argument is the foundation also of the second branch of the objection, viz., that the land declared to be conveyed by the deed is not the same which is described in the survey and declaration, it may be at (72) once considered in its application to both parts of the objection. In answer to it the plaintiff's counsel has submitted whether the deed may not be viewed in its *description* of the thing conveyed as referring to its character and condition at the time of the actual date of the instrument, although it operates to pass it, such as it is, at the execution of the instrument. As the whole purpose of describing the subject-matter of a conveyance is to designate and make it known, we have no doubt but that it may be identified by its past character or condition. But we do not discover any reference in the description contained in this deed to the character of its subject-matter at any antecedent day. The grantor speaks in the descriptive as well as in the bargaining part of the conveyance, in words of the present time. He sells what he has, in that which he describes as it is. Another answer, however, has been given, which we deem entirely satisfactory. The subject-matter of the bargain is so completely identified by its name, by its localities, and by certain other marks of

description, that the addition of another particular which does not apply to it nor to anything else, creates no confusion, and must be rejected as having been inserted through misapprehension or inadvertence. *Veritas nominis tollit errorem demonstrationis.* The subject-matter of the grant is Yonah's reservation in fee simple of six hundred and forty acres of land allotted and reserved under the treaty of 1819, including his improvements, whereon he now lives, and has resided for some time past, situate on both sides of the Tuckaseejah River, and including an old town called Tuckaleechy. The document is exhibited of Yonah's title. It is for six hundred and forty acres of land allotted under that treaty; it includes the improvements whereon he had lived before the date of the deed, and whereon he then lives. It is on both sides of Tuckaseejah River, and includes the old town called Tuckaleechy. One of two conclusions is inevitable. Either the land described in this official document of title is the same with that bargained and sold in the deed, although the deed through mistake, and in a particular by no means essential to the designation of the thing granted, states it, not as
(73) run off and marked, but as thereafter to be run off and marked, or that the deed itself, notwithstanding all its solemnities, passes nothing, and was intended by the parties to pass nothing. We believe that the law does not hesitate in its choice between these alternatives, that it will reject the mistaken words of addition contrary to the real fact, and that the same rule of construction must obtain here as was sanctioned by the Court in *Reddick v. Leggett*, 7 N. C., 543, and *Proctor v. Pool*, 15 N. C., 370.

In the discussion of the second objection made to the plaintiff's recovery, many questions were extensively argued by the counsel which the Court deems it unnecessary to determine. Whatever may have been the nature of the Indian title before the treaty, or whatever may be the legitimating extent of the treaty-making power, it cannot be doubted but that the general government with the sanction of the State might grant portions of the ceded territory in fee simple to individual Indians. We hold it clear, that in the present case this grant was made, and that the State sanctioned the grant. It will be seen that by the second section of the treaty of 1819 the United States agree to allow a reservation of six

hundred and forty acres to each head of an Indian family residing within the ceded territory (those enrolled for the Arkansas excepted) who may choose to become citizens of the United States in the manner stipulated in the treaty of 1817. It may be that those words of reference characterize not only the method by which these heads of Indian families are to become citizens of the United States, but the nature of the estate which they are to take in the reservations. If so, it is admitted that it would be a perplexing matter to define this estate. By the eighth article of the treaty referred to it is declared that in the reservations thereby given the donees or reservees shall "have a life estate, with a reversion in fee simple to their children, reserving to the widow her dower," with a proviso "that if any of the heads of families for whom reservations may be made should remove therefrom, then the right to revert to the United States." But the third article of the treaty of 1819, which makes or allows reser- (74) vations to the particular Indians named in the certified list is perfectly explicit as to the estate which they are to take in these reservations. It is to be *"in fee simple,"* that is, to them, their heirs and assigns forever, and the reservations are made to those in fee simple because *they* "are believed to be persons of industry, and capable of managing their property with discretion, and have, with few exceptions, made considerable improvements thereon."

If the cession from the Indians within the chartered limits of this State, or any of the terms of that cession, *needed* the sanction of this State, we hold it to be indisputable that such sanction was given. From the promulgation of the treaty of 1819, which was the only one directly applying to lands within the limits of North Carolina, down to this day, we have enactments upon enactments of our Legislature acknowledging the treaty, claiming the lands as ceded thereby, and making regulations in conformity to the stipulations of it. If the State could have been guilty of the perfidy to claim the benefit of the cession, and at the same time withhold from the Indians any part of the consideration of that cession, it is perfectly certain that she did not commit nor meditate such a baseness. The review which has been taken of the various legislative acts on this subject show a full and unequivocal acquiescence on her part in the treaty and its terms. The

Act of 1820, prohibiting white men from buying reservations, is a striking illustration of the spirit which actuated her throughout. It was manifestly intended to protect those donees or reservees, who, as heads of families, had obtained reservations under the second article, the character of whose estate therein it seems so difficult to define, while it expressly excepts the only reservations made in North Carolina, made by the third article, those to Richard Walker and the Big Bear. It is observable, too, that in expressing this exception, there is a coincidence of phrase with the language employed in that article "*managing* their lands," so remarkable that it scarcely could have been accidental. The deed of Belk was
(75) executed before the Act of 1820 was passed; but Yonah's power of alienation is in no manner derived from the act. It was incidental to the nature of his estate as a fee simple.

Some criticisms were made, in the course of the argument, upon the import of the word "reservation." Treaties use indiscriminately as applicable to reservations the verbs "give," "make," "allot," and "allow." Sometimes the form of expression is, reservations shall be given; at other times, shall be made and allotted; and at other times, allowed. It is demonstrable that the word reservation is used, not in a technical, but in a popular sense, meaning a part taken out of the whole, and applied differently from the residue.

It has been also urged that the reservations made are accompanied by a condition of perpetual residence. We think not. A *declaration* of intent to reside permanently on the tract is made a condition precedent to the allotment of such tract; but that condition once performed, and the allotment made, the estate is in law absolute. If this be so, then it is said the United States or the State might be defrauded by a false declaration; to which it may be answered, that it was believed full reliance might be placed in the sincerity of the declaration; and that no *material* injury would result even should this expectation prove ill-founded. But if a condition of perpetual residence were annexed to the grant of the estate, it is not for any individual to treat that estate as at an end until the State shall have enforced a forfeiture for breach of the condition.

On the whole, the Court sees no error in the judgment below, and directs it to be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Mayo v. Blount, 23 N. C., 286; *Scull v. Pruden,* 92 N. C., 174.

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(76)

DEN ex dem. JOHN B. HARRY v. ARTHUR GRAHAM et al.

1. Where a call in a grant was, "running N. 45 degrees W. 220 poles to a black-oak near his (the grantee's) own line," and the black-oak could not be found, nor its locality proved, it was *held*, that the word *near* would not carry the line 30 poles further, to reach another tract of the grantee's, but that it must be stopped at the end of the distance mentioned in the grant.

2. A posterior line of a grant will never be reversed for the purpose of showing the termination of a prior one, unless the description of the posterior be more specific than that of the prior, and unless from the posterior, a mistake in the prior can be clearly shown.

3. An allegation of fraud against a purchaser at execution sale, will not be heard from a stranger to the execution.

4. The case stated for the Supreme Court by the Court below will always be presumed to be correct in point of fact, unless from an examination of the whole record a mistake clearly appears.

EJECTMENT, tried before his Honor, *Judge Martin,* at LINCOLN, on the last circuit.

The principal question in the cause was one of boundary, arising upon a grant to John Graham, the ancestor of the defendants. It described the land as a tract of three hundred acres "adjoining the lands of A. Collins, L. Beard, and of Graham himself, and beginning at a post-oak, Beard's corner, and running thence with his line S. 45° West, two hundred and twenty poles, to a chestnut and red-oak, Beard's corner; *thence N. 45° West, two hundred and twenty poles, to a black-oak near his own line,* thence N. 45° East, two hundred and twenty poles, to a post-oak, his own and Beard's corner; and thence S. 45° East, two hundred and twenty, to the beginning." The dispute was where the second line of this grant should terminate. No corner was found at the end of the distance mentioned in the grant, nor did it reach

any other tract belonging to Graham, but by extending it thirty poles further it intersected with a line of an older patent of his. In running from the termination of the second line, if it should be stopped at the end of two hundred and twenty poles, it was discovered that the course mentioned in the grant would not lead to Beard and Graham's corner, which was established as the termination of the third line.

(77) For the defendants it was contended that the second line should be extended to the line of Graham's other tract, or at least so as to intersect with the third line reversed. But his Honor held that the word "near" was too vague and uncertain to carry the second line to the line of Graham's other tract, and that the distance mentioned in the grant must be adhered to.

Another question, which arose on the trial, was that at an execution sale under which the lessor of the plaintiff claimed, he prevented competition by representing that he would suffer the son of Collins, whose lands were sold, to redeem; and it was urged that his purchase was thereby rendered fraudulent. His Honor charged that if competition was prevented in the manner represented, the defendant could not avail himself of it; that as to him the deed was good.

The jury found for the plaintiff, and the defendant appealed.

Another objection was urged in the Supreme Court against the plaintiff's recovery—that the lands mentioned in the sheriff's deed are not the same as those levied on. Upon this point the case made up for this Court stated, "for one of the tracts of four hundred acres, a grant to Collins was shown, bearing date in 1797. This four hundred-acre grant was within the boundary set forth in the sheriff's deed, answered to the calls of the levy, and included the field in dispute, of which defendant was in possession."

Pearson, for the defendant.
Iredell, for the plaintiff.

RUFFIN, C. J. The question of boundary arises upon the patent of John Graham, dated 24 November, 1813. The dispute is, how far the second line, which runs from the chestnut and red-oak shall go. The Court held that it stopped at

the end of the distance, while for the defendant it is contended that it shall be extended thirty poles further, so as to make it reach the line of another tract of the patentee; or, at all events, until it intersects with the next line reversed, from the post-oak called for as the corner of Beard and the patentee, that corner being identified. This Court (78) concurs in the construction of his Honor.

There is but one principle applicable to questions of this sort. If there be but one description in the deed, that is to be strictly adhered to. If there be more than one, and they turn out, upon evidence, not to agree, that is to be adopted which is most certain. Course and distance from a given point is a certain description in itself; and therefore is never departed from unless there be something else which proves that the course and distance stated in the deed was thus stated by mistake. It has been held that a tree called for, and found not corresponding to the course and distance, establishes the mistake, and is itself the terminus. So of the line of another tract of land. But if the tree be not found, nor its former situation identified, it is the same as if the call for it had been omitted; for there is then no guide but the course and distance. Such is the case here; no tree being found nor its locality proved, otherwise than is shown by the deed to have stood at the end of a line of a certain length. The description is therefore the same as if the call had been for a stake, or an imaginary point, at the end of the distance, unless the reference to the patentee's other line controls it.

The call is not for that line, or for a tree in it, but to one *near* it. The argument is that, as it cannot be told how near, we must go to it. The argument would be strong if the call had been simply for a black-oak near the line, as in the case supposed by the counsel, of a description *beginning* at a stake or tree, not found, near the middle of a field. There would be no point but the middle of a field to govern; and rather than the deed should be void for uncertainty, that would be adopted. But if the words of the deed were "beginning at a stake near the middle of the field, and *standing one hundred poles east from a certain tree,*" it would be different; because the former uncertainty, as to the point in the field, which is the beginning, is removed by the mathematical certainty to be attained by mensuration from the other point

given. That is precisely the case before us. The call
(79) is not merely for a black-oak near the other lines, but that black-oak is represented as standing N. 45° West, two hundred and twenty poles from a chestnut and red-oak, which are found; which removes the uncertainty which, without any distance given, we should feel upon the point, *how near* the line of the other tract is to be approached.

So with reversing the lines. The party cannot have recourse to that method of ascertaining a previous line in the order of the description, unless, by reversing, he gives a more certain means of identifying the prior line than the deed gives in its description of that line itself. The natural order of survey is that which the deed shows the parties to the deed adopted to identify to their own satisfaction the land intended to be conveyed by the one to the other. It may be considered as their directions, how the identity shall be established by survey, at any future time, and it supposes certain points, as the beginning, to be established. If, therefore, the description of a particular line be complete in itself, the Court cannot vary from that description, because it will not correspond with the description of a posterior line, unless the description of the latter be more specific than the former, and unless from the latter a mistake in the former can be clearly inferred. For example: if this deed had said that the line from the corner chestnut and red-oak ran to a black-oak near the patentee's other line, and gave neither course nor distance, or only one, "and *thence* N. 45° East, two hundred and twenty poles, to a post-oak, his own and Beard's corner," the line might be reversed from the post-oak, to ascertain the corner of that, and the next preceding line, because that affords the only evidence (the black-oak not being found, or its locality otherwise identified) of the point at which the one line terminated and the other began. So, if even upon such calls as the present deed contains, a line of marked trees were found, by tracing the line back from the post-oak, corresponding with the survey for the three-hundred-acre patent, that might carry the other line to the point of intersection,
because it would prove an actual survey, and be the
(80) evidence of permanent natural objects to show where the black-oak once actually stood; which, wherever it stood, would be the terminus, and control the distance men-

tioned in the deed. But there is no such evidence in this case; and in the absence of it there is nothing more to show that the mistake was made in the description of the second line than that it exists in that of the third line. A mistake was certainly made in the one or the other; in which, is the question. The one line has a certain beginning, and the other has a certain ending, and they meet at the same point, and that point of meeting is uncertain. It cannot be rendered more certain by running to it, from either of the given points; and therefore we are not at liberty to resort to the description of the latter line, to control that of the prior line, but must lay down the prior one from its own description. Because it is prior, it controls the next line, since that begins where the other ended.

An effort was made to show from the deeds, of which copies form part of the case, that the land sold and conveyed by the sheriff to the lessor of the plaintiff are not the same that he levied on. If that were true, the sale would be void as far as depended on the writs of *venditioni exponas;* and it would be proper to consider the answer to the objection founded on the writs of *fi. fa.* But we have not examined it, because the case stated in the exception affirms that the sheriff's deed answers to the calls of the levies, and includes the field in the defendant's possession. Now, although the deed and levies are stated in the record to form part of the case, and therefore if they showed that the statement of the fact in the exception was founded on mistake, this Court might decide according to the truth, as collected from the whole case; yet, it must be presumed that the case stated is correct in point of fact, and it is impossible without the aid of further evidence and surveys for the Court here to ascertain whether it be or be not correct.

No observation upon the point of fraud in the bidding can be necessary, in addition to that of his Honor. If there was a fraud, it was on Collins, and does not concern the defendant, from whom no evidence of it ought to have been heard.

PER CURIAM. Judgment affirmed.

Cited: Brown v. Kyle, 47 N. C., 443; *Cansler v. Fite,* 50 N. C., 428; *Safret v. Hartman,* 52 N. C., 203; *Mizell v. Simmons,* 79 N. C., 188; *Chasteen v. Martin,* 84 N. C., 395;

Burton v. Spiers, 92 N. C., 506; *Norwood v. Crawford,* 114 N. C., 518; *Duncan v. Hall,* 117 N. C., 446; *Brown v. House,* 118 N. C., 872; *Tucker v. Satterthwaite,* 123 N. C., 519; s. c., 126 N. C., 960.

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(81)

CARNEY NEAL qui tam v. MILLS ROBERTS.

Acts of the Legislature are presumed to be constitutional; and when in the Court below the validity of an act was drawn in question, and the judgment was in support of it, and the case stated no facts from which the contrary could be inferred, the judgment must be affirmed.

THE case, made for the Supreme Court by his Honor, *Judge Strange,* at TYRRELL, on the last circuit, stated that "this was a penal action for the violation of an act passed at the last session of the Legislature (1833), ch. 133, entitled 'An act regulating lay days on Frying Pan in Tyrrell County.' The facts were clearly proven, and the defendant relied entirely upon the ground that the act of Assembly was unconstitutional and void; but the Court being of a different opinion and verdict and judgment being rendered for the plaintiff," the defendant appealed.

No counsel appeared for either party.

DANIEL, J. It is stated in the case, that the facts were clearly proven; but the defendant contended that the act of Assembly which gave the penalty, was unconstitutional. But what facts were clearly proven the case does not disclose. We suppose the facts were proven that the defendant worked his seine at the time and place mentioned in the warrant, and that it was done after the sun rose on 17 April, 1834. But whether the waters called the Frying Pan compose an arm of the sea, or constitute a navigable river, or a river or creek not navigable; whether the land covered by the water is subject to entry, by our entry laws, or whether the defendant had any title whatever, either to the lands or "liberty" of fishing in the waters mentioned, we are unable to learn from the case

sent to this Court. We are not to presume that the Legislature would pass an unconstitutional act, and not discovering anything in the case to induce us to declare the act unconstitutional, we are bound to affirm the judgment.

PER CURIAM. Judgment affirmed.

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(82)

SAMUEL S. DOWNEY v. SMITH MURPHEY et al.

A will written for a testator *in extremis*, by one standing in a confidential relation to him, and who takes a benefit under it, is not invalid, by a conclusion of law, unless read over to the testator, or its contents otherwise proved to have been known to him. But these facts must be left to the jury, and from them fraud may be inferred, unless repelled by proof of *bona fides*.

DEVISAVIT VEL NON as to a script produced by the plaintiff as to a will of John G. Smith.

On the trial before *Norwood, J.*, at GRANVILLE, on the last Spring Circuit, the plaintiff having made out a *prima facie* case, by proof of the formal execution of the supposed will, for the defendants, the caveators, it was objected that the deceased, at its execution, was not of perfect memory, and if he had been, that he was at its execution weak in body and mind, and *in extremis*, and that the execution by the supposed testator was, under these circumstances, procured by the fraudulent practices of the plaintiff, who was the executor, and took a large beneficial interest under the supposed will.

Upon the issue much testimony was offered by both parties. It was alleged by the defendants that the supposed will never had been read over to or by the testator; to establish the contrary, the plaintiff, among other things, endeavored to prove that an interlineation near the end of the paper was in the handwriting of the deceased. The deceased, when in health, was a man of clear head, an acute intellect, and of decided business habits; but at the time of the execution of the will was laboring under a lingering disease which had prostrated his physical powers and had affected his understanding, as was contended by the defendants.

It was admitted that the will was in the handwriting of the plaintiff, who was a favorite nephew and confidential

agent of the deceased; but it was contended that it was written from instructions given by the deceased. To establish the fraudulent practices of the plaintiff, the counsel for
(83) the defendants read a part of the deposition of one Dawes, and stopped at an account of a conversation between him, Dawes, and James Downey, the father of the plaintiff. The counsel of the plaintiff then observed that the other side might read the account given by the witness of that conversation; but the counsel of the defendants declining to accept this permission, his Honor was moved to direct that the whole deposition should be read; but the presiding Judge refused to give this direction, observing that the party offering a deposition was bound to read everything in it relevant to the cause; but if the witness added matter which was illegal and irrelevant, the party offering it was not bound to read the objectionable parts, and if disposed to do so, would be prevented by the Court.

To impeach Dawes, the plaintiff offered the deposition of one Terry, who, upon his examination in chief, deposed that he would not believe Dawes upon his oath; that he did not believe him, Dawes, to be an honest man, and that he had known him to steal. Upon his cross-examination the witness stated that he did not know the general opinion concerning Dawes's character in the neighborhood; that he only stated his own, and that he never had any conversation respecting his, Dawes's, character with the neighbors. The reading of the examination in chief being objected to, his Honor refused to let it go to the jury.

The counsel for the plaintiff then proposed to read that part of Dawes's deposition in which he related the conversation with James Downey, avowing his intention to call the latter to contradict him, but his Honor refused to suffer this to be done.

His Honor, in his charge to the jury, informed them that in order to the validity of a will, the testator must have a sound and disposing mind and memory, but that though his mind might be weakened or impaired from age and bodily infirmity, still if he retained intellect enough to make a rational disposition of his estate, it was sufficient; that as with a deed, so with a will, in general, if executed by the party, it was sufficient, though not read over, or the contents thereof shown to be known to him—the act of execution recog-

nizing and adopting the instrument. But that there might be circumstances which would require a differ- (84) ent rule; that a will being written by a legatee, was looked upon as a suspicious circumstance, the suspicion being greater or less according as the interest was greater or smaller; and that where a will was written by one taking a large and beneficial interest under it, for a testator, in his last will, and under great weakness from disease, and the writer was a confidential agent and adviser of the testator, it was necessary, in support of the will, to produce some evidence to show a knowledge by the testator of its contents, as that it was read to him or by him; or, if not so read, proof that it was written from instructions by the testator, and according to them, would be sufficient, as showing that he knew the contents; that for this purpose the testimony as to the interlineation being in the handwriting of the deceased was submitted to them, and if in his handwriting, it would be important evidence; the evidence and the inference to be drawn from it was for them.

A verdict was returned for the caveators, and the plaintiff appealed.

Iredell and *Devereux,* for the will.
Nash and *Badger, contra.*

RUFFIN, C. J. The opinion given in the Superior Court, upon the question of evidence arising on the deposition of Terry, conforms to the rules laid down in this Court, *State v. Boswell,* 13 N. C., 209; and those rules, we think, are based on sound principles, and correctly drawn from the most approved writers on the law of evidence. The witness says that he knew Dawes, to whose discredit he is examined, for several years; that he did not consider him an honest man; that he had known him to steal, and that he would not believe him upon oath. The opinion of the witness is obviously founded upon particular facts within his own knowledge; and cannot be more admissible than direct evidence of the particular facts themselves, on which that opinion is founded. Evidence to such particulars is incompetent, both because it would be a surprise on the witness, and render trials (85) so complicated that they could never be terminated.

Barton v. Morphes, 13 N. C., 520. The *opinion* of a discrediting witness is competent, when professing to be founded on *general belief* that the witness to be discredited is dishonest, or of bad moral character. This is going far enough, and seems not to be warranted by principle, if we are to regard the opinion of the discreditory witness as standing upon its own force alone; but that is not the ground of receiving it. The opinion of the individual is heard, not as of itself establishing the want of credit of the impeached witness, but as the best means in the power of the witness under examination of communicating to the jury the *extent of the general belief* to the disadvantage of the other witness. The opinion of one person that another is a dishonest man, and therefore that his testimony is not credible, is not evidence of *character*, but of facts; and is the weakest evidence of facts. The only opinion worthy of consideration is that, from general reputation, the witness is unworthy of belief. That opinion no person can give who makes the preliminary statement that he does not know what other persons think of the witness, but that he speaks from his own knowledge. He must not only know what other persons think of the impeached witness, but he must profess to know what other persons, generally, think, before he is competent to state his character, or his inferences from that character. The character which goes to the credit of a witness is that imputed to him by general reputation, and that only.

The Court is of further opinion, with his Honor, that the plaintiff had no right to read that part of the deposition of Dawes which speaks of the declarations of James Downey. Those declarations were irrelevant to the issue; for what James Downey said, that S. S. Downey had said, could not establish the declarations of the latter, nor any fact inferable therefrom. The party who took the deposition could not have read that part of it, if objected to on the other side. Nor is the Court bound to hear it, if not objected to on either side, because it is irrelevant, and burdens the trial to
(86) the delay of business. The party cannot be bound to read what the Court is not bound to hear and will not hear. Consent of both parties, or the act of either, cannot render irrelevant evidence competent. The evidence in question was not barely a collateral fact, but was, in every

stage of the case, altogether irrelevant to the subject of inquiry. There are many collateral facts that are not irrelevant; such as the disposition of the witness or his relation to the parties; his declarations about the controversy at other times, which may have a material bearing upon his credit. As to such points, it is a disputed question whether the answers of the witness to interrogatories in the course of his cross-examination are conclusive, upon which no opinion is now necessary. If the party calling the witness examine him without objection to such points, undoubtedly the other side may contradict him. The counsel for the plaintiff has endeavored to put this case upon that footing. We think the argument is defective, both because the matter to which the witness deposes is not simply collateral, but is immaterial, and therefore incompetent; and because the party who took the deposition did not examine those points. Depositions are taken in this State without an exhibition of interrogatories in Court, or to the opposite party, and without their being settled by any officer prior to the examination. They are also often taken in the absence of the party, and without any interrogatory, except that implied in the oath. Such was the case here. We think the voluntary statement of the witness, under such circumstances, of irrelevant and incompetent matter, cannot be regarded as a statement drawn out by the party. No doubt he is still the witness of the party, who can neither discredit him nor suppress his deposition. But he is not obliged to read it, as being made evidence in all its parts, simply because the witness was examined at his instance. He cannot discredit his own witness; but the other side cannot call on him to furnish them the means of discrediting the witness. When taken, the deposition is evidence for either side, so far as its contents are in themselves competent, and no further.

Having considered these points, that which arises upon the instructions to the jury is next presented. It is one of much importance, both in its bearing upon the (87) interests of these parties and as a general question of law. His Honor first stated to the jury, as we conceive, correctly, that to the validity of a will a disposing capacity was necessary, and a knowledge of the contents of the instrument; and that in point of law such a knowledge was pre-

sumed from the fact of execution, if the capacity was satisfactorily established. But he further stated, there were cases which required a different rule; and, applying the exception to the case before him, he proceeded to lay down these principles to the jury: That a will being written by a legatee was in law a suspicious circumstance, the suspicion being greater or less in proportion to the interest; that when a will was written, by one taking a large and beneficial interest, for a testator in his last illness, and great weakness from disease, and the writer was a confidential agent and adviser of the supposed testator, it was necessary in support of the will to produce some evidence to show a knowledge by the testator of the contents of the will, as that it was read to him, or by him, or, if not so read, that it was written from instructions and according to them, which would be sufficient.

The instructions assume that in point of law the validity of the will depends upon such proof; and that in such a case, the inquiry is not one of fact, whether the maker of the instrument actually knew, or was actually ignorant of the contents of the paper; but is an inference of law, either that he did not know them or that it does not appear, and it ought to appear, by plain proof, that he did know them. The correctness of the instructions depends, therefore, upon the inquiry, whether by the laws of this State these are inferences of fact to be drawn by the jury, or are to be stated by the Court as fixed legal principles.

In support of the opinion of the Court many cases have been read from the ecclesiastical courts of England, in which the rules laid down to the jury are stated as *rules* or *principles,* which govern those courts. But those cases, and the terms in which the Judges deliver themselves, are far from satisfying us that the nature of the inquiry makes
(88) it, in a court of common law, the province of the Judge and not the jury to determine it. The Court of Probate in England decides every question both of law and fact which the case presents; the capacity of the testator, in all its various gradations as perfect, doubtful, and defective. Where of the last kind, the instrument is necessarily inoperative under all circumstances. But where a testable capacity is found, the degree of proof that the instrument was

freely executed, and that its provisions were really assented to by the maker, must necessarily vary with the degree of capacity, in order to satisfy a rational mind that there was such free agency, knowledge, and assent as the law demands. That tribunals such as the ecclesiastical courts, constituted of a single Judge, holding the Court permanently, and deciding the whole case, should, in the course of repeated discussions of evidence of a similar kind, adopt, for the ease of the Court, and for the information of suitors, some propositions, as the measure of that proof, to be deemed sufficient or insufficient under particular circumstances, is not surprising. To the usefulness of such court, such rules, as *principles* for the government of the Judge, are indispensable. They are requisite, both to relieve the Judge from unnecessary *labor,* and to exclude the suspicion and the danger of unlimited and irresponsible discretion upon all questions of fact, which, in a permanent magistrate, is intolerable. Hence, in the very able opinions which have been delivered by the Judges of those courts are constantly found expositions of the reasons on which the credit to be given to the witnesses ought to rest, and on which inferences of particular facts may be rationally drawn from certain evidence; and such reasons, and the determination to which they led in one case, are naturally appealed to by counsel, and acknowledged by the Court in succeeding cases. At first they may be respected only as the conclusions of an able, well-instructed and experienced mind, well calculated to influence another mind to adopt the same conclusions. But they soon acquire the authority which a succeeding Judge is neither able nor willing to deny to them, of being *precedents.* For, as has been forcibly remarked, it is the professional tendency to repose on precedents; and it is fortunate for the institutions of every coun- (89) try that there is such a tendency.

That the principles upon which the Ordinary in England requires particular proof to rebut the presumption of fraud in obtaining a will from a man of weak or impaired faculties, are obligatory upon each succeeding Judge who may sit in those courts, seems to be a settled point in those courts. Nor can it be denied that those principles have been most carefully considered and cautiously settled. They address themselves forcibly to every rational mind, and were most

properly urged against the instrument offered for probate in this case. The Court is not to be understood as pronouncing them insufficient to repel all the presumptions drawn from the execution of the instrument by a testator in the condition of mind and body imputed to Mr. Smith by the witnesses. Upon its sufficiency or insufficiency this Court would carefully abstain from intimating any opinion; and allusion is made to it only to prevent the supposition that our decision rests on a difference of opinion between us and his Honor upon the weight to which the evidence was entitled. On the contrary, we think the question is, whether either court can determine its weight; in other words, whether the inquiry be one of fact or law. That question cannot be determined by the decisions of the ecclesiastical courts, for whether the nature of the inquiry be of the one kind or of the other, the remarks, rules, principles, by which one great Judge was guided in the discussion, weighing and deciding on evidence of a particular character, in a particular case, would be authoritative on another upon the like evidence in a like case. The question depends upon the nature of the inquiry according to the common law of England and the statute laws of this State. For although the question is one of probate, and therefore might appropriately be governed by that portion of the ecclesiastical law which is incorporated into the common law and administered in peculiar jurisdictions, yet it has seemed good to the Legislature to refer it to a tribunal of a different nature, a jury. That tribunal is the favorite of the common law as the arbiter of facts, and not less so with the Legislature of this
(90) State than with our ancestors; for not only is the decision of all facts within the power of a jury, but in this State it is exclusively their province to decide them, uninfluenced by the opinion of the Judge upon the weight of the evidence, or its sufficiency to prove any fact in dispute. To the jury any argument may be urged impugning or enforcing deductions of one fact from another proved, or from the defect of full proof of either the one fact or the other; and the opinions of men of able and practiced minds may properly be laid before them in argument as likely to influence their judgment by the force of the reasoning which led to those opinions, or by the authority of the opinions themselves, coming from such sources. But it is impossible to

say that such a tribunal is bound as to a conclusion of fact by the precedent set by another tribunal for the decision of facts, whether consisting of a single Judge or of the numerous judges who compose a jury. There is no *law* to such a body but its conclusions upon the evidence as to the fact sought.

Is there a principle to be found laid down anywhere in the common law, as a positive precept, that *it is necessary* to the validity of the will of a man, written in his last illness, and when very weak from disease, by one who takes a large legacy under it, and was the confidential friend and adviser of the alleged testator, that those who offer the will should distinctly prove, besides the testable capacity of the maker, and the due formal execution of the instrument, the further facts, by distinct evidence, that the maker knew and approved of the contents of the instruments? If there be such a proposition, it has escaped our researches among the treasures of the common law. It is the principle of that code that a paper obtained by duress or undue influence, or by deception, and without the free consent of the maker, given upon a knowledge of its provisions, is not a will. But that the want of such knowledge and consent are legal conclusions from evidence that the supposed testator was worn down by disease, and that the writer of the paper derives a large benefit under it, is nowhere found; nor that the like conclusion is absolutely to be drawn from those facts, with the additional one, that the writer was or was not a stranger or a confidential friend of the testator. After (91) proof of capacity and execution, the common law lays down no rule upon the subject, but submits the general question to the jury for a decision, according to their conclusions upon the actual facts of undue influence, imposition on the testator, his knowledge of the contents of the paper, and assent thereto—under the comprehensive inquiry, whether a fraud has been practiced. Where the testator's situation is such as to render the perpetration of a fraud easily practicable, the jury may say they are not satisfied one was not practiced, and thence infer its existence, unless the contrary be clearly shown. It is in the power of the jury, and may, as reasonable men, be their duty, for fear of fraudulent practices, and in prevention of them, to find a fraud, or to give

a verdict such as they would if they had found a fraud, where there is a defect of proof to negative it. It is upon that principle that ecclesiastical Judges regulate their judgments, as we understand them. But those are conclusions of fact, arising from evidence given or withheld. A *defect of proof*, unless it be a *total* defect, is for the consideration of the jury, wherever the law requires the intervention of a jury. The ecclesiastical Judge can say, a case is not established, because it is reasonable to require in the particular case full proof, and to such and such points the proof is not full. So may a jury. But a Judge, under our system of jurisprudence, cannot determine, when *prima facie* proof is offered, that the case fails because further proof is not given. That the will was written by a legatee—that he stood in the relation of kindred, friend, or agent to the party, do not, of themselves, prove that the testator did not know or assent to the dispositions. They raise a suspicion of imposition, and make it reasonable to call for explanations. Such explanations may be given, as acknowledged in these very instructions, by evidence of the actual reading of the will by or to the testator, or by proving its conformity to the instructions given for it. There are other circumstances equally satisfactory, such as the conformity of the will to previous or subsequent declarations, or to such dispositions as the party would be
(92) prompted by natural affection to make. The intimacy of the relation between the writer and the testator may be, and is even less suspicious than if they were strangers, upon the supposition that each draftsman writes himself heir. These considerations must satisfy the mind that upon such a subject the law cannot lay down as a test, that a will is or is not valid, when executed under any one or more of the particular circumstances mentioned; but necessarily refers the facts upon which its validity legally depends to the decision of the jury, under evidence as to all the circumstances attending its preparation or execution: the condition, mental and physical, of the testator; the contents of the instrument, and the benefits provided in it for those actively concerned either in the preparation or execution. Evidence to each of these points may have an important bearing upon the just conclusions to be formed of the testator's capacity, and of the advantages that may have been taken of his

weakness or confidence; and a jury may justly be alarmed at the danger of exposing testators to importunities and imposition, which would follow from establishing papers to be wills, when obtained *in extremis,* and under suspicious circumstances, unless those suspicions be removed by affirmative and plenary evidence that the testator comprehended the dispositions made for him, and fully and freely sanctioned them. But, like other questions of actual intention; of the state of the mind; of influence; knowledge or ignorance of one person, and of integrity or dishonesty and fraud of another; this question is one of fact, to be decided by the jury upon evidence; which, in the opinion of the Judge, is competent, as tending to establish any of those facts. Its tendency, it is the province of the Judge to explain, by stating what conclusions may be drawn from it; but whether it establishes a fact, or whether a conclusion deducible from it is or is not rebutted by other evidence, is the province of the jury to say.

That the rules of the ecclesiastical courts, although most sensible deductions of facts, are not parts of the law of this country, but only of the law of those courts, we deduce, not only from the manner in which the Judges in those tribunals speak upon this question, but from the na- (93) ture of the subject itself. But furthermore, the questions which arise before the ecclesiastical courts upon the probate of testaments arise also in the courts of common law, in ejectments on devises, or on issues out of chancery, to try the validity of the will. Yet none of the principles on which the Ordinary makes deductions from evidence given or withheld have been incorporated into the common law, so as to be laid down to the jury, as conclusions drawn from them. The evidence is submitted to them, that they may draw their own conclusion. For this very reason the Chancellor will not determine the validity of the will, but always sends it to an issue, *devisavit vel non;* and upon that issue and in ejectment the verdict is frequently at variance with the judgment of the ecclesiastical Judge on the same instrument, offered in his court as a testament.

For these reasons we think there was error in stating it as a proposition of law that the evidence supposed was necessary to the validity of the paper as a will. It should have been

left to the jury to say whether they thought, from the evidence given, that the presumption from execution, that the party knew the contents of the paper, understood them, and assented to them, was in fact rebutted by the state of his mind and health at the time the will was prepared and executed; by its contents, and by the circumstances relied on by the defendant; or was confirmed by its contents and by the evidence to the testator's knowledge of them, and other circumstances offered on the other side. The case must therefore be submitted again to the jury.

PER CURIAM. Judgment reversed.

Cited: Carr v. McCamm, post, 277; *Newlin v. Freeman,* 23 N. C., 522; *S. v. Parks,* 25 N. C., 297; *Bottoms v. Kent,* 48 N. C., 164; *Wright v. Howe,* 52 N. C., 414; *King v. Kinsey,* 74 N. C., 263; *S. v. Johnston,* 82 N. C., 592; *Horah v. Knox,* 87 N. C., 490; *S. v. Garland,* 95 N. C., 672.

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(94)

NATHANIEL MARKLAND, admr. of HENRY TUCKER, v. MARK CRUMP.

1. A covenant for quiet enjoyment runs with the land, and one who is evicted may recover upon such covenant in the deed of any prior vendor, and this whether he purchased with or without warranty.

2. An intermediate vendor cannot, in respect of his liability, upon his covenant for quiet enjoyment, recover of a prior vendor, but must first make good the damages of the person evicted.

ACTION to recover damages for the breach of a covenant of quiet enjoyment, contained in a deed, whereby the defendant conveyed land to the intestate of the plaintiff. The breaches assigned, were: 1. The eviction of the intestate by paramount title. 2. The eviction of the bargainee of the intestate.

The plaintiff having made out a *prima facie* case, for the defense it was proved that the interest of the intestate in the land had, before the eviction, been sold under a *fi. fa.* against the intestate, to one Marcum, and that the latter was the person who had really been evicted.

Upon this fact being admitted, his Honor, *Judge Seawell,* at ROWAN, on the last circuit, ruled that the plaintiff, to entitle himself to a verdict, should "show a disturbance, either of his intestate, or of some person holding under him, as his tenant, whose possession was that of the intestate. That the plaintiff as administrator could not recover for a disturbance, when the person disturbed could claim the benefit of the covenant, in the deed to the intestate. That the covenant declared on either ran with the land to the assignee or it did not. If the former, the assignee being the person disturbed, was entitled to its benefit—that but one action could be maintained for the disturbance, and to allow that action to be brought by one whose interest had passed away, and who had received the full value of the land, for a disturbance which in no way molested him, and this to the prejudice of the person really injured, who had lost both the lands and his money, was not consistent either with reason or justice. That if, on the other hand, the covenant did not run with the land, and extend to the assignee—the purchaser under the *fi. fa.*—then it had not been broken by the eviction of the latter." (95)

In submission to this opinion, the plaintiff suffered a nonsuit, and appealed.

Pearson, for the plaintiff.
Nash, for the defendant.

RUFFIN, C. J. The opinion delivered in the Superior Court is that entertained by this Court; and very much upon the reasons expressed by his Honor. For it would seem to be a first principle that in an action sounding in damages, none can be recovered if none have been sustained by the plaintiff.

Marcum, the purchaser at sheriff's sale, has been regarded by the plaintiff's counsel as a purchaser with warranty; because, under the statute, he can have recourse to Tucker, the defendant in the execution. The Court supposes it clear that he is an assignee who, by reason of the privity of estate, is entitled to the benefit of, and bound by all covenants running with, the land. *Spencer's case,* 6th Resolution, 5 Rep., 17. But whether such recourse against Tucker would amount to such a warranty, or ought to be construed to have the same

effect, the Court does not deem it necessary to determine. Because we think an express warranty from Tucker to Marcum would not, upon the eviction of the latter, give an action to Tucker against Crump, on his covenant of warranty, nor be a bar to that of Marcum against Crump on the same covenant.

In support of the proposition to the contrary, the counsel for the plaintiff has been able to adduce no case in which that was the point adjudged. In *Kane v. Sauger,* 14 John., 89, *Chief Justice Spencer* states the general rule to be that where covenants run with the land, if it be conveyed before a breach of the covenant, the assignee only can sue upon the subsequent breach; but if the assignor be himself bound in his deed, to indemnify the assignee against such breach, there the assignor only can bring the action. This is certainly a very explicit declaration of the opinion of a most respectable Judge. But it is not entitled to the authority of an
(96) adjudication, because it was not necessary to the decision of the case, and is only a *dictum.* There the plaintiff, who was the assignor, had immediately taken back the legal estate, by way of mortgage in fee; and therefore his assignee could not, under any circumstances, have had an action; for at the time of the breach he was not the assignee, but the plaintiff was reinvested with the estate by force of the mortgage. Upon this ground the plaintiff had judgment. As it was held that in the case proved the effect of the plaintiff's warranty could not be a bar to the action, it became immaterial to determine what the effect would have been if the estate had remained in the assignee until his eviction. No English case is referred to by the Chief Justice, and but one in this country, that of *Bickford v. Paige,* 2 Mass., 460. This last case does not seem to us to admit of such an interpretation. *Chief Justice Parsons* says that "the assignee alone can sue, unless the nature of the assignment be such that the assignor is holden to indemnify the assignee against a breach of the covenants by the original vendor, which is founded on the principle that no man can maintain an action to recover damages who has suffered none." This is a very clear opinion, that an assignee without a covenant from his immediate vendor may sue on a remote covenant, and that he alone can sue in such a case; and that for the very best reasons—be-

cause nobody else is injured. But it affords no inference that an assignee with warranty may not also sue on a remote covenant, but only that in such case he is not the only person who can have remedy for a breach. In the context, it must mean that the assignee who is evicted may sue the remote covenantor for the damages sustained by him; but that this case is not like the former in which he alone could have the action, because in this case, another, besides the assignee, may sustain damages, namely, his assignor upon his engagement to indemnify. As without such engagement the assignor could not sue, because he could not be injured, so, where he paid the damages to the assignee upon such an engagement, the assignor could sue, because he then had suffered. But because the assignor can bring an action after suffer- (97) ing, it does not follow that he can bring his action upon the eviction of his assignee, and before satisfying the assignee, and to the exclusion of the assignee himself. This construction of the language of *Chief Justice Parsons* is that adopted by the Court in *Withy v. Mumford,* 5 Cowen, 137, in which the doctrine laid down in *Kane v. Sauger* is pointedly denied, under such circumstances as to destroy its authority, even in the courts of New York. For had the point been necessary to a decision in *Kane v. Sauger,* it is adjudged directly to the contrary in *Withy v. Mumford,* in which it was held that the assignee who is evicted may sue any one or more of the covenantors, whether immediate or remote; and that an assignor who has himself covenanted cannot sue a prior covenantor until he has himself satisfied the evicted assignee; but that upon doing that, he can.

This Court is at loss for a reason upon which the first rule laid down in the Supreme Court of New York can be sustained, or the second can be impeached. If there be a reason, it must be peculiar to covenants and conveyances of land. None such is perceived; and to us the position contended for seems to be inconvenient, unjust, and contrary to analogy. It multiplies suits, by requiring each assignee to sue his own vendor only. It may defeat the evicted person of his damages, by enabling his insolvent assignor to recover the money from the only person among those liable, who is able to pay it; and he may refuse to pay it over. Covenants which run with land were always exceptions to the maxim

of the common law, that *choses in action* could not be assigned. They cannot be separated from the land and transferred; but with the land they could, as being annexed to the estate in possession, and bound the parties in respect to the privity of estate. In other instances of assignments tolerated by law, the assignee having for the time being the right, is alone entitled to an action on the contract, and may have his action against any of the parties bound, either mediately or immediately. Negotiable mercantile instruments afford a similar example. The holder may sue, not only his own
(98) endorser, but also any one whose name is on the paper. But an endorser cannot have an action against any party prior to himself, until he shall have taken up the paper from the last holder, and thus become the holder to his own use. The good sense of this principle seems to make it necessarily applicable to all cases of successive engagements of indemnity.

It is admitted that, if the grantee with warranty convey without warranty, the last grantee may sue directly on the covenant of the first grantor. It is not seen why the interposing a second warranty should, nor how it can, restrict the assignee to a remedy on the last covenant. In each case the first covenant came to him, as being annexed to the estate; and thus belonging to him, he, and not another, ought to have the action on it, until he gets satisfaction. When that is made, the person who makes it is then the injured person, and may have his action to make himself whole. It is for the benefit of all parties that each claimant should have a direct recourse on the person ultimately responsible, if he be able to respond.

An argument was drawn for the plaintiff from the doctrine of *Buckhurst's case*, 1 Co., 1, that a vendor who warrants is entitled to keep the title papers, which contain covenants to which he may resort for his indemnity. The inference sought is that if he has a right to the deed, it must be because he alone can bring an action on the covenants in them, or that such possession gives him the exclusive right of action. In our opinion, that consequence cannot be deduced. It affords no better ground for his action for a breach subsequent to his assignment than for such action before any breach, in anticipation of one. The possession of the title

deeds may indeed put the assignee to a difficulty in framing his declaration, making profert, and giving evidence of a deed not in his own possession, which he must encounter, and get over as well as he can. Indeed, it may be that he may be excused from a profert, if the record shows that he is not entitled to the deeds. But these obstacles merely arise out of the rules of pleading and evidence, as between the assignee and covenantor, and have no reference to the rights of an intermediate owner who has parted from his title. (99) The first feoffor can make direct satisfaction to the person evicted, or take a release from him. That an assignee may sue the remote covenantor, the case of *Middlemore v. Goodall,* Cro. Car., 503, is a direct authority. It is true that the plaintiff there did not state in his declaration that his conveyance was with warranty; so that the effect of such a covenant is not precisely shown by that case. But it is equally true that it does not appear that the deed to the plaintiff did not contain such a covenant. Now every declaration must give a complete cause of action, and if the law be that an assignee with warranty cannot sue on any prior covenant, the declaration ought to aver that the plaintiff is an assignee with one. Nothing of that kind is found in that case nor in the precedents. They are silent as to the covenants contained in all the deeds under which the plaintiff claims, except the particular covenants on which the suit is brought, and only sets forth the operative parts of the deed, as conveying the estate to the plaintiff. Nor has any case or precedent been found of a plea, that the conveyance from the plaintiff's vendor, or from some assignor between himself and the defendant, did contain covenants, although the case of such covenants, posterior to that of the defendant in the action, must frequently have occurred.

But a still broader ground was asserted in the argument, which is, that even if the assignee Marcum could sue, yet the plaintiff, as administrator of Tucker, the defendant's bargainee, could also have his action: the two actions resting on different grounds, the former on privity of estate and the latter on privity of contract.

For this no direct authority has been cited, and we suppose there can be none. For it is a proposition of simple justice to the covenantor that both actions cannot be maintained.

It has, however, been likened to the case of the action of covenant by a lessor against an assignee of the lessee, and also against the lessee himself, both of which will certainly lie. That, however, is but the ordinary case of a creditor having a right to look to two persons severally for the same debt, from one only of whom is he allowed to collect
(100) it. This would be the anomalous one of two persons having each the distinct right to recover and collect from a debtor, the same money, although he ought to pay it but once. The present case is really correlative, not to that of a lessor claiming from the lessee and his assignee the rent due him, but to that of a lessor who has assigned his reversion and sues the lessee on the covenants in the lease for rent arising after the assignment. That such an action cannot be sustained upon the privity of contract has been settled ever since Lord Coke's time. *Walker's case,* 3 Co., 22. It is there laid down "that if the lessor grants over his reversion, now the contract runneth with the estate, and therefore the grantor shall not have any action of debt for rent due after his assignment, but the grantee shall have it; for the privity of contract follows the estate, and *is not annexed to the person, but in respect of the estate.*" The explanation of the difference he proceeds afterwards to give, and it is most reasonable. "The lessee himself," he says, "shall not prevent by his own act such remedy which the lessor hath against him; but when the lessor grants over the reversion, there, *against his own grant* he cannot have remedy, because he has granted to another the reversion to which the rent is incident." It is thus seen, that to an action by the lessor against the lessee or his assignee, it is a full answer *that the plaintiff had assigned before the rent accrued.* The same principle embraces the present case. Tucker, the defendant's grantee, cannot have the action, because he conveyed to Marcum, before the breach, the estate to which the covenant was incident and the original privity of contract will not support the action, but in respect of the privity of estate continuing, or of the loss of the estate and damages thence arising to the plaintiff.

Indeed, if privity of contract alone was sufficient without reference to the estate, the present plaintiff might recover as well if his intestate had conveyed without as with warranty;

for the covenants inserted in the deed do not make it more or less an assignment of the land. Yet the very cases cited admit the assignee's sole right to sue, if there had not been a warranty by his vendor; for if he had not the (101) right there would be no redress.

But there are other cases from which it is clear that mere priority of contract will not suffice to sustain an action; but the plaintiff must show a damage arising to himself in particular from the breach alleged. Those of *Kingdon v. Nottle,* 1 Maule & Selw., 355, and 4 Id., 53 are clear examples. The defendant conveyed to the testator with a covenant of seizin; and the first action was brought by the plaintiff *as executrix,* upon the idea that such a covenant was broken as soon as entered into, and therefore that, as in other cases of a breach in the testator's time, she ought to sue in that character. But it was held otherwise on demurrer, because although the warranty was broken in the testator's time, yet the declaration did not show a special damage to him in his lifetime, and the heir or devisee took the estate such as it was, and was entitled to the benefit of the covenant; and therefore the *executrix* could not sue, and claim the damages as *personalty,* since the testator had not so treated the breach of covenant. *Lord Ellenborough* said there would be a difficulty in admitting the executrix to recover at all, that is, upon the declaration as framed, without allowing her to recover the full amount of damages for the defect of title; and in that case the heir would be barred by her recovery, for the heir could not maintain another action for the same breach and the same damages. All the Judges, indeed, put it pointedly, that the recovery by the executrix would be a bar to the heir, and leave no subject of a suit for the devisee, although the estate, such as it was, came to him, and the damage was actually to him. Accordingly, when the same plaintiff, in the last case, sued as *devisee,* there was judgment for her. These cases are contrary to several in this country in one respect, which is, that upon a covenant of seizin the assignee of the land cannot have an action, since the breach is necessarily before the assignment. *Greenby v. Wilcox,* 2 John., 4, and *Beckford v. Paige,* 2 Mass., 460. That difference does not affect the question before us; and the case of *Kingdon v. Nottle* is a clear authority for this principle,

that whenever a person is *in* the land in privity of
(102) estate with the covenantor, eviction or defect of title is not necessarily to the damage of one who has merely a privity of contract; but that such latter person must particularly show *his* damage before he can sue on the contract. It further establishes that the action of the person who has only a privity of contract will not lie, because a recovery in it would be a bar to the person who had the privity of estate, to whom the injury is immediate, and who therefore has the first right to satisfaction.

Upon the whole, therefore, the Court is of opinion, both upon authority and reason, that a purchaser with warranty from his vendor may sue upon a covenant of warranty to his vendor, and as a consequence, that the latter cannot sue until he shall have sustained damage by making satisfaction upon his own covenant.

This is the more proper here, since the rule established in this State for measuring the damages; because the plaintiff's intestate ought not to recover his purchase money, but only what Marcum recovered from him; that is to say, the purchase money and interest paid by Marcum. *Williams v. Beeman,* 13 N. C., 483.

The observations on the first point supersede the necessity of examining the question whether an estate passed by the defendant's deed or not. The declaration is not framed on a covenant to convey, as if this were such an agreement and not a conveyance, but on this as a covenant of warranty of an estate conveyed. The gravamen is the eviction of Marcum, the assignee, and the damages arising therefrom, and not a refusal to make an assurance. Now, the eviction of the intestate's assignee can never, *per se*, be an injury to the plaintiff, but to the assignee alone, until he shall have called on the plaintiff to make him whole. When that shall be done, the plaintiff can state a case in his declaration on which a special damage to his intestate, or to himself as administrator, can be seen and assessed to him.

PER CURIAM. Judgment affirmed.

Cited: Thrower v. McIntire, 20 N. C., 495; *Lee v. Gause,* 24 N. C., 446; *Lewis v. Cook,* 35 N. C., 196; *Smith v. Brit-*

tain, 38 N. C., 354; *Mills v. Abrams,* 41 N. C., 460; *West v. West,* 76 N. C., 48; *Smith v. Ingram,* 130 N. C., 103; *Ravenal v. Ingram,* 131 N. C., 551; *Wiggins v. Pender,* 132 N. C., 638.

(103)

WILLIAM J. T. MILLER v. SARAH IRVINE.

The Act of 1819 (Rev., ch. 1019), "to make void parol contracts for the sale of lands and slaves," does not require that the consideration of the contract should be set forth in the written memorandum of it.

ASSUMPSIT brought to recover damages for the breach of the following written contract, viz.:

"I, Sarah Irvine, do agree to convey to William J. T. Miller, a certain piece or parcel of land adjoining the tract of land which said William J. T. Miller bought of me. The lines to run as follows: to begin with the line where it crosses the main big road leading to McSwain's Ford on First Little Broad River, thence southwest course with the edge of the old field down to the Still-house Branch; thence up said branch to the said William J. T. Miller's line of the three-hundred-acre tract. 15 January, 1829.

"The condition of the above obligation is such that if the three-hundred-acre tract which the said William J. T. Miller bought of the said Sarah Irvine does hold out to be four hundred acres after being surveyed, the above obligation of Sarah Irvine is to be void and of none effect. 15 January, 1829."

On the trial at RUTHERFORD, on the last circuit, before his Honor, *Judge Martin,* after the plaintiff had proved the execution of the contract, his Honor held that, no consideration being mentioned in it, the action could not be maintained. The plaintiff then proposed to prove by parol evidence that the contract was founded on a valuable consideration. His Honor refused to receive the testimony, saying, "that to do so would be to alter, or add to, the written contract." The plaintiff was nonsuited and appealed.

No counsel appeared for either party.

RUFFIN, C. J. The question presented in this case is, whether the consideration on which a written parol promise is founded must appear in the instrument itself or in some other writing, or may be proved *viva voce*. At the common law agreement not under seal requires a consideration (104) to support it; but the consideration might be proved in any manner in the party's power—by the same instrument, or by a separate one, or by witnesses. The question, therefore, depends upon the Act of 1819. (Rev., ch. 1016). It is a new question in our courts, and as it involves important consequences, and is one upon which there has been, upon similar statutes, much conflict of opinion in other courts, we have very deliberately considered it. The majority of the Court is of opinion that the statute does not operate upon the case, and that the consideration may be proved since, as before the statute. The act does not, on the one hand, give validity to an agreement, merely because it is written; but leaves the common law in force, which makes a consideration indispensable to its validity. So, on the other hand, while the common law requires such consideration, the statute does not prescribe that it shall be proved otherwise than at common law. If an alteration of such magnitude had been intended, as that no consideration should be required when there was a writing; or that, if required, the writing should set it forth; we think each would have plainly appeared by distinct enactments, and that neither would have been left to doubtful inference. The provisions actually made seem to have the obvious purposes of protecting persons from being drawn inconsiderately into sudden engagements touching the important properties in lands and slaves, and against the misunderstanding and misrepresentations of the extent of such engagements, by witnesses. Hence the contract must be put into writing and signed by the party *to be charged therewith*. It need not be signed by both parties; the one charged by the contract must sign it, and his signature shall suffice to charge him. If both are chargeable by the contract, as written, then both must sign it, to charge both. But if one only is to be charged on it, there seems to be no reason why it should contain any matter but such as charges him; that is, such stipulations as are to be performed on his part. It does not vary his contract, explain or alter

it, to prove a consideration *aliunde;* for at the common law, such explanations or alterations by parol evidence were as inadmissible as they could be. This proves (105) that the consideration is *no part of the contract,* but only *the inducement to it;* and that the case is not more within the words than the spirit of the statute. To us it seems there could be no doubt upon the construction of the act, upon its terms and upon principle, were there no decisions either way. They have embarrassed us; but considering them upon their intrinsic merits, the weight of them is on the side to which our own opinion inclines. They are all regarded with respect; but, none of them having authority in this State, the respect must be in proportion to the degree of conviction produced on the mind by the reasoning of those who made them.

In England it must now be deemed the settled law that under the statute of 29 Charles II. contracts for the sale of land, in consideration of marriage, and to answer for the debt of another, must state the consideration. The point was first decided in 1804, in the case of *Wain v. Warlters,* 5 East, 10, and has been followed by the cases of *Saunders v. Wakefield,* 4 Barn. & Ald., 595 (and 6 Eng. C. L., 530), and *Jenkins v. Reynolds,* 3 Brod. & Bing., 11 (and 7 E. C. L., 328), and *Lyon v. Lamb,* in the Court of Exchequer, Fell on Guar., 318. The latter cases may, however, be regarded as decisions by compulsion under the authority of *Wain v. Warlters* as the leading one. They are but submissions to that judgment, which was that of the Court of King's Bench. No trace of the doctrine can be found earlier than 1804. That fact has much more authority than the decision of any court, or of a Superior Court followed by those which are inferior. The silence of all the courts and counsel, from the reign of Charles II. to the year 1804, implies that the law was deemed certain during that long interval. On which side of this question was the professional impression? It cannot be said that we have no means of ascertaining, and that the question was not made, because the statute was deemed plain, for in *ex-parte Minet,* 14 Ves., 189, *Lord Eldon* said there was a variety of authorities directly contradicting *Wain v. Warlters;* and in *ex-parte Gardom,* 15 Ves., 286, he says, "until that case was decided I had

always supposed *the law to be clear* that if a man agreed in writing to pay the debt of another, it was not necessary that the consideration should appear in the writing." I do not cite *Lord Eldon's* words merely to put his opinion as authority upon the question of construction against that of the Judges of the King's Bench, but for the sake of his testimony as to what was understood to be the law up to the time of the case in which that construction was rendered authoritative in that country. It cannot be denied that if it was the true one there, upon the word *agreement* in the statute of Charles, it is equally true here, upon the word *contract* in our act. But *Lord Eldon* is not the only English Judge whose opinion does not accord with that decision. In *Egerton v. Matthews*, 6 East, 307, which arose on sec. 17, Statute Frauds, the decision was irreconcilable with it. That section provides "that no *contract* for the sale of goods shall be allowed to be good unless some note or memorandum in writing of the said *bargain* be made and signed by the parties to be charged with *such contract.*" The contract, then, was simply a bill of parcels with the prices; and yet it was held valid. The case was tried before *Lord Ellenborough*, at Nisi Prius, who had presided in *Wain v. Warlters*, and thought the case within that precedent, and so ruled. But when the question was argued in Bank, he and the other Judges distinguished it upon the word *bargain*, instead of *agreement*. If there be a difference between *"bargain"* and *"agreement,"* I am unable to comprehend it. But that difference could not exist in the context of sec. 17, which calls *the* bargain "such *contract,*" which surely must be as comprehensive as *"agreement."* In this country we find as little satisfaction expressed with that case as in England. Soon after the decision of *Wain v. Warlters* reached us the point was made in the courts of New York and decided without great consideration, in conformity to it; and after being thus established, has been followed in that State until it is there, as it ought to be, settled law. But *Chancellor Kent*, then Chief Justice, dissented from it in *Leonard v. Vredenburg*, 8 John., 29. In the other courts of the
(107) Union, we have been unable to find any willing recognition of the doctrine; and in several of the States it has been positively denied after full argument at the bar and

from the bench. In *Violett v. Patton,* 5 Cranch, 142, the Supreme Court of the United States evaded the force of *Wain v. Warlters,* upon the words *"promise* or *agreement,"* in the statute of Virginia; but I think, that "promise" and "agreement" there, are not used to describe different instruments or those of different obligations, but are obviously referred to the same thing; the *promise* being the *agreement vice versa.* This decision evinces a great unwillingness to deny directly the authority of an adjudication, but the still greater unwillingness to follow it, as a reasonable one. In Connecticut, *Judge Swift* has opposed to it an able course of reasoning, which must greatly influence a dispassionate mind, not bound down by authority. (Note to *Wain v. Warlters,* in the American edition of East). In South Carolina the question is still reserved for decision by the Court; the case of *Wain v. Warlters* being expressly put in doubt. In Massachusetts the whole law, and all the cases up to 1821, were reviewed in *Packard v. Richardson,* 17 Mass., 122; in which *Chief Justice Parker,* in an elaborate opinion denies its correctness, as *Chief Justice Parsons* had before done in *Hunt v. Adams,* 5 Mass., 358, and overrules it. These last decisions are entitled to the more respect, because in Massachusetts the statute of Charles had been literally reenacted as early as the year 1692; and, as in England, no question had been made upon it as altering the rule of the common law in respect to setting out the consideration in the written memorandum. But those eminent Judges declare, that from their earliest recollection a doubt had never been entertained upon the point.

As I before remarked, the weight of authority thus seems to be against *Wain v. Warlters.* At all events, the authority of that case is at least neutralized, and this Court is free to exercise its own judgment upon the question. We have done so; and the majority of the Court is of opinion that the decision of his Honor is erroneous, and that the (108) judgment must be reversed.

It may be proper to say that, if in any case, the statute requires the consideration to be stated, it does so in all. We do not perceive a difference between executed, and executory considerations in this respect, as there is the same danger of perjury in proving either. Our opinion goes on this:

that the statute does not extend to the consideration at all, but that the fraud and perjury provided against, is that which charges the defendant to do what he never contracted to do.

GASTON, J., concurred.

DANIEL, J., *dissentiente.* The Act of Assembly passed in the year 1819, declares, "that all *contracts* to sell or convey lands, tenements or hereditaments, or any interest in or concerning them, shall be void and of no effect, unless such *contract* or some memorandum of note thereof, shall be put in writing and signed by the party to be charged therewith, or some other person thereto by him lawfully authorized; except contracts for leases not exceeding the term of three years." The question to be decided is, whether the consideration is such a part of the contract, as must necessarily be set forth in the writing to make it good and available under the statute?

The British Statute of Frauds, 29 Charles II., enacting upon this subject, makes use of the word *agreement* instead of the word *contract,* as is mentioned in our statute. The words are synonymous, and the same construction which has been put upon the British statute, I think, ought to be placed upon ours. *Wain v. Warlters,* 5 East, 10, decided in 1804, was an undertaking to pay the debt of another. The written engagement signed, was in these words: "Messrs. Wain & Co.: I will engage to pay you by half-past 4 this day, £56, and expenses on bill, that amount, on Hall. John Warlters, 30 April, 1803." It was objected that the writing did not express the consideration of the defendant's promise, and that this omission could not be supplied by parol testimony (which the plaintiff proposed calling), and that for (109) want of such consideration appearing upon the face of the written memorandum, it stood simply, an engagement to pay the debt of another without any consideration, and was therefore *nudum pactum* and void. *Lord Ellenborough,* upon a view of the statute of frauds which avoids any special promise to pay the debt of another, "unless the *agreement* upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and

signed by the party to be charged therewith," etc., thought that the term *agreement* imported the substance, at least, of the terms on which *both* parties consented, and included the consideration moving to the promise, as well as the promise itself; and the *agreement* in this sense, not having been reduced to writing, for want of including the consideration of the promise, he thought it could not be supported by parol evidence, which it was the object of the statute to exclude; and therefore nonsuited the plaintiff. A rule *nisi* was obtained for setting aside the nonsuit and granting a new trial, on the ground that the statute only required the promise or binding part of the contract to be *in writing,* and that parol evidence might be given of the consideration, which did not go to contradict it, but to explain and support the written promise. After argument in the King's Bench, the rule was discharged. *Lord Ellenborough* in delivering his opinion, said: "It seems necessary for effectuating the object of the statute that the consideration should be set down in writing, as well as the promise, for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise, which was only a conditional one; and then it would rest altogether on the consciences of the witnesses to assign another consideration in the one case and to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain." All of the other Judges gave their opinions, and concurred with his Lordship. The rule (110) in this case was followed in New York, in *Sears v. Brink,* 3 John., 210; *Leonard v. Vredenburg,* 8 John., 29. Also in New Hampshire, *Neelson v. Sanborne,* 2 N. H., 414. But in Massachusetts, where the statute of frauds is nearly a *verbatim* copy of the British statute, the rule is rejected, and parol evidence admitted to prove the consideration. *Lent v. Padelford,* 10 Mass., 230; *Packard v. Richardson,* 17 Mass., 122. So in New Jersey, *Barkley v. Beardsley,* 2 South., 570. In Connecticut, *Judge Swift* has made a vig-

orous attack upon *Wain v. Warlters.* (Note to the American edition of East). *Chief Justice Parker,* in delivering his opinion in *Packard v. Richardson,* which was in 1821, predicted that *Wain v. Warlters* would not be recognized as law, if the principle ever came to be again examined in any of the Superior Courts at Westminster. In this he was mistaken, for in that very year the question was again brought before the King's Bench, in the case of *Saunders v. Wakefield,* 4 Barn. & Ald., 595 (and 6 E. C. L., 530), when all the authorities were referred to by counsel, and the Judges gave their opinions *seriatim,* and affirmed the doctrine laid down in the case of *Wain v. Warlters.* They say that by the fourth section of the statute of frauds an agreement to pay the debt of another must, in order to give a cause of action, be in writing, and must contain the consideration of the promise as well as the promise itself, and parol evidence of the consideration is inadmissible. *Bayley, Judge,* said: "I find, too, that the word *agreement* in this clause is coupled with contracts of marriage, and for the sale of lands; now, in those cases it is clear that the consideration must be stated. For it would be a very insufficient agreement to say, 'I agree to sell A B my lands,' without specifying the terms or the price; and if those could be supplied by parol evidence we would let in all the mischief against which the statute meant to guard, viz., of having important parts of the contract proved by parol evidence." *Holroyd, Judge,* said "that upon an agreement upon consideration of marriage, or a contract for the sale of lands, it is quite clear that the consid-
(111) eration must be stated in writing." In *Jenkins v. Reynolds,* 3 Brod. & Bing., 11 (and 7 E. C. L., 328), a few months after, in the Common Pleas, the same rule was adopted. In 1807, in the case of *Lyon v. Lamb,* Fell Mer. Gua., 318, the Court of Exchequer admitted the doctrine in *Wain v. Warlters.* The question has been twice brought immediately to the notice of the Court in South Carolina, but no direct decision has there been given. In *Stephens v. Winn,* 2 McCord, 372, no consideration was expressed in the face of the note, nor was there any offer to prove it by other evidences. In a case in 3 McCord, 158, there were two written papers, and the Court was of the opinion that the one referred to the other, and the consideration by that means

was made to appear in writing. The Court seem to think that the doctrine in *Wain v. Warlters* should be confined to contracts executory on both sides; and if the consideration has been executed, then the terms of the contract on the other side being in writing, could be enforced, although it did not contain the consideration. They proceed to say that, "If A, in consideration that B will undertake to build him a house, promise to pay him so much money, and B does undertake to build the house, their minds meet about the matter, and this constitutes an agreement; and if the consideration of a promise to pay the debt of another consists of something moving at the time, and to be afterwards performed, it might perhaps comport more strictly with the letter of the act that it should be set out on the face of the promise as constituting a part of the agreement. But if B, in consideration that A had advanced him so much money, undertakes to build the house, here the undertaking is altogether on the part of B; the *aggregatio mentium,* the meeting of the minds, is past and gone, and the contract consists altogether of the promise to build the house; and in such a case the requisitions of the statute would seem to be fulfilled, if the promise itself was in writing; although, like every other contract, to make it obligatory, it must be founded on a good consideration, which might be proved by parol." But the Court then proceed to say they "have thought it advisable to reserve the determination of the question for some further occa- (112) sion, when it is possible more lights may be thrown upon it." These remarks were made in the year 1825, and without having had the cases of *Saunders v. Wakefield* or *Jenkins v. Reynolds* brought to their notice. All the cases referred to in the opinion delivered, except *Sears v. Brink,* are cases which do not profess to overrule *Wain v. Warlters,* but contain *dicta* throwing doubts on that case. I do not know the wording of the statute of frauds in South Carolina, but if it uses the language of the statute of Charles II., I am at a loss to see how the Court could have entertained the idea that as wide a door was not opened to let in frauds and perjuries, when the *amount* of money *actually paid,* or the *quantity,* of articles *actually delivered,* might be permitted to be proven by parol, as when the amount of money or quantity of articles were to be *hereafter paid* or *delivered.* It seems

to me that the same mischiefs intended to be prevented by the statute would as well arise in the first class of cases as in the latter. It is a distinction which I nowhere find in any of the authorities, and I cannot bring my mind to the conclusion that the distinction is a sound one.

Without a good consideration no contract could be enforced at the common law. The framers of the statute well knew this. Can it, therefore, be supposed that the Legislature, when it passed the statute to guard the property and rights of the subject against the frauds of parties and the perjury of witnesses, did not contemplate that the whole terms of the agreement or contract should be in writing, as well the consideration to be paid, or which had been paid, as the engagement on the other side? It seems to me that it did, and that the weight of authority is on that side of the question. I therefore am of the opinion that judgment must be affirmed.

PER CURIAM. Judgment reversed.

Cited: Gardner v. King, 24 N. C., 300; *Ashford v. Robinson,* 30 N. C., 116; *Rice v. Carter,* 33 N. C., 300; *Nichols v. Bell,* 46 N. C., 33; *Green v. Thornton,* 49 N. C., 232; *Kent v. Edmonston, Id.,* 532; *Thornburg v. Masten,* 88 N. C., 295; *Mfg. Co. v. Hendricks,* 106 N. C., 493; *Tunstall v. Cobb,* 109 N. C., 325; *Hall v. Misenheimer,* 137 N. C., 186, 188.

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(113)

JAMES PAGE v. GREENBERRY WINNINGHAM.

1. A defendant who has given bond under the Act of 1822, ch. 3, for the relief of insolvent debtors, cannot object to the informality of the bond, and pray a discharge on account thereof.

2. When this Court affirms the judgment of the Superior Court, ordering a defendant in a *ca. sa.* to be imprisoned, it directs *procedendo* to the Court below, to carry the judgment into effect.

THIS case came on before his Honor, *Judge Seawell,* at RANDOLPH, on the last circuit, when it appeared that the defendant had been arrested under a *ca. sa.,* at the instance of Smitherman and Page, for the use of James Page, and had given a bond with security, payable to James Page alone,

conditioned for "his personal appearance before the Justices of the County Court of Pleas and Quarter Sessions, to be held for the county of Randolph, at the court-house in Ashborough, on the first Monday of August next, then and there to stand and abide by such proceedings as may be had by the Court, in relation to his taking the benefit of the law provided for the relief of debtors in certain cases." Upon the appearance of the defendant in the County Court, his counsel moved for his discharge upon the ground that the appearance bond was illegal and void, being made payable to James Page alone, instead of Smitherman and Page, and for other defects in its condition, whereupon the Court ordered the defendant to be discharged, and the plaintiff appealed to the Superior Court. His Honor held that "it was not competent for the defendant to object to the informality of the bond, which by the act of Assembly he is required to tender for his release from confinement," and reversed the order of the County Court, and adjudged that the defendant should be imprisoned until he should be discharged therefrom by due proceeding of law. From this the defendant appealed.

No counsel appeared for the defendant.
Mendenhall, for the plaintiff.

GASTON, J. The Court affirms the judgment which has been rendered in this case in the Superior Court. We deem it unnecessary to say more in support or (114) explanation of the grounds of this decision than to refer to those set forth in the opinion of the Judge below, of which we entirely approve.

In general, this Court enforces by its own process the execution of its own judgments; but as the defendant is not in person before us, and if he were, from the constitution of the Court, the ulterior proceedings, which *may* follow upon the judgment affirmed, could not be here had, we direct that in this case a *procedendo* issue to the Superior Court of Randolph to cause the judgment there rendered and here affirmed to be carried into effect.

PER CURIAM. Judgment affirmed.

Cited: Wilkings v. Baughan, 25 N. C., 90; *Earle v. Dobson,* 46 N. C., 517.

STATE v. LEE OSBORNE.

Discharging a rule to show cause why a new trial should not be granted is not a judgment from which an appeal can be taken.

THE defendant was convicted on the last circuit, at ANSON, before his Honor, *Judge Settle,* of being the father of a bastard child; "whereupon," the record stated, " a rule was moved for and obtained to show cause why a new trial should not be granted for misdirection of the Court, which, on argument, was discharged. From which the defendant prayed an appeal to the Supreme Court, and it was granted."

Winston, for the defendant.
The Attorney-General, for the State.

PER CURIAM. The case is not in a state for the decision of the questions argued at the bar, as no judgment of the Superior Court, either final or interlocutory, appears upon the record. The discharge of a rule to show cause why a new trial should not be granted is not an interlocutory judgment within the Act of 1831, ch. 34, which means a decision of the Court establishing a right of the plaintiff or disposing of some part of the defense conclusively, as that partition be made, or that the defendant answer over, or the like.
(115) The appeal must therefore be dismissed at the costs of the appellant, and the case remanded for further proceedings to be had in the Superior Court.

STATE v. HUGH COBB.

An act making it an indictable offense to fell timber in the channel of a particular creek, in a particular county, is a public law, and need not be recited in an indictment on it.

THE defendant was put upon his trial at CASWELL, on the last circuit, before his Honor, *Judge Seawell,* upon the following indictment: "The jurors for the State upon their oaths present, that Hugh Cobb, late of the county of Caswell (farmer), since the first day of February, A. D. 1834, that is to say, on the twentieth day of February, A. D. 1834, with force and arms in the county of Caswell aforesaid, unlawfully and maliciously did fell timber in the channel of Hogan's Creek, in the county of Caswell aforesaid, and did then and there, by such felling of timber aforesaid, on 20 February aforesaid, obstruct the channel of the creek aforesaid, in the county of Caswell aforesaid, to the great damage of the owners of the lands on said creek, contrary to the act of General Assembly in such case made and provided, and against the peace and dignity of the State."

This indictment was founded on the Act of 1833, ch. 144, entitled, "An act to prevent the felling of timber, in the run of Hogan's Creek, in Caswell County," which enacts, "that if any person or persons, after the first day of February next, shall fell timber in, or otherwise obstruct the channel of Hogan's Creek, in the county of Caswell, shall be guilty of a misdemeanor, and may be indicted for the same, in the County or Superior Courts of the said county, and on conviction shall be fined at the discretion of the Court, not exceeding twenty dollars for each and every offense against this act."

Upon the trial the defendant's counsel moved the Court to instruct the jury that unless the obstruction proved (116) was such as to hinder the passage of fish, the indictment could not be sustained, which his Honor declined. The defendant was convicted, and moved in arrest of judgment that no indictable offense was created by the act by reason of the omission of words of reference to the person offending. This motion was overruled; but his Honor inclined to the opinion that the act was a private one, and

the fact of its not being recited in the indictment would have been an insuperable objection, but for the acts of Assembly curing informalities in indictments. Judgment was entered upon the verdict, and the defendant appealed.

W. A. Graham, for the defendant.
The Attorney-General, contra.

RUFFIN, C. J. The indictment is founded on the act of Assembly, passed in 1833, ch. 144, "to prevent the felling of timber in the run of Hogan's Creek, in Caswell County." The principal difficulty arises upon the doubt whether the statute is a private or public one. The indictment does not recite it, but concludes generally, *contra formam statuti.* It is to be collected from the record that, in the opinion of his Honor, this is a private law; and in this Court the counsel for the defendant insists that it is of that character, and, consequently, that the indictment is defective, because it does not state the statute more particularly.

The Court is of opinion that if this were a private statute, the indictment would not be good. The existence of a private law is a fact which must be found or admitted of record to give the Court information of its contents; and it must be so stated in pleading as to enable the other side to put it in issue by *nul tiel record*, if the issue to the Court be preferred to one to the jury. The general conclusion against the form of the statute is not an averment of fact, but merely an inference of law, so that our statutes of *jeofail* relative to indictments do not reach the case at all.

But after much consideration, we all think that this is a public law, of which the Court and jury are bound to (117) take notice, without proof. The distinction between the two kinds of statutes is not marked with a precision, either in the text-books or reports, which plainly assigns a particular statute to the one or the other class. Tested by a particular criterion, this would fall amongst private laws. The subject is a single creek in a single county, upon which there is no navigation or general trade carried on, as far as appears in the statute, the indictment, or the case stated. But by another criterion it is determined to be public. It makes the obstruction of the channel of the creek "a misde-

meanor," and enacts that any person guilty thereof shall be liable to be indicted in the County or Superior Court, and, on conviction, shall be fined at the discretion of the Court, not exceeding twenty dollars. The act is not limited to particular persons, but extends to all. It does not barely forbid the deed, and impose a penalty, but it renders the perpetration a crime, to be prosecuted by indictment, in any of our courts of record, and to be punished by a fine to the State. In *Rex v. Buggs,* Skin., 428, it was held that giving a penalty to the King made a statute public; for it concerned him as sovereign, representing the body politic, and touched the public revenue. That case is recognized as law in *Rex v. Morgan,* 2 Strange, 1066, which lays down the same rule. Much more in this case is the law to be judicially noticed, for the creation of a crime, of which all persons are capable, and rendering it punishable by indictment and fine, must inform the courts of the law, since every man is charged at his peril to abstain from all crimes, and it is the peculiar duty of magistrates to punish them.

The remark found in the common-place books, that when an indictment is founded on a private act it must recite it, is not, when properly understood, in conflict with this opinion. The meaning of such passages is not exemplified by the authors in whose works they are found; but we suppose them, necessarily, to refer to breaches of public duty, punishable indeed by indictment, according to the general law, but where the duty in that particular instance is imposed on the individuals charged, by a law against common right, and confined in its operation to particular persons and places. If, for instance, a statute should be passed that in one cer- (118) tain county particular persons designated should keep the highways in repair, or if a town be incorporated and its authorities be invested with power to raise money to keep the streets in repair, and it is made their duty to raise it, but the act does not in either case expressly declare that default shall be a misdemeanor, or be indictable: in those cases, although by the public law, the neglect to repair the highways be a misdemeanor, and the offenders may be indicted, yet the act imposing the duty and burden on the particular individuals must be shown. The reason is, that the Court could not other-

wise know that it was their duty. The indictment would be like one under our present law against an overseer of the road, which did not charge that he was overseer. But here the act extends to all persons, and within its own body creates and defines the offense, prescribes the mode of prosecution to be by indictment, and the degree of punishment; so that it is not necessary for any purpose to look beyond the act itself.

Upon the other points the Court thinks there was no error. The act begins by saying, "that if any person shall fell timber," etc., and then uses these words, "shall be guilty of a misdemeanor," etc., without saying "such person," or, "he or they so offending," shall be guilty. An objection to this deficiency of precision might be listened to with more favor if the act professed to create a felony, or was highly penal against a misdemeanor. But the sense is so clear, and the omitted words are so necessarily to be implied from the context, that the Court is obliged to imply them in the case of an inferior misdemeanor, punishable at the discretion of the Court.

The policy which produced the law is not known to the Court, and is not declared in the act. It may have been to favor the passage of fish; but it may also have been to encourage navigation up the creek from Dan River; or, more probably, to protect the adjacent lands from the greater destruction by the inundations caused in high waters by such obstructions. The statute makes the act of obstruction a
(119) crime, and therefore the indictment need only aver the fact, without a further averment as to its effect.

For these reasons we deem the conviction and sentence in the Superior Court right in point of law, and direct that the same be certified to that Court.

PER CURIAM. Judgment affirmed.

Cited: S. v. Chambers, 93 N. C., 603; *S. v. Wallace,* 94 N. C., 828.

STATE v. WILLIAM ORMOND.

An indictment for biting off the ear, under the second section of the Act of 1791 (Rev., 339), must state the offense to be done *on purpose*, as well as unlawfully.

THE defendant was tried, and a general verdict of guilty found against him, at GREENE, on the last circuit, upon the following indictment, viz.:

"The jurors for the State, upon their oaths present, that William Ormond, late of the county of Greene, on the first day of January, one thousand eight hundred and thirty-four, with force and arms, at and in the county aforesaid, unlawfully did bite off the ear of one Charles Joiner, at and in the county aforesaid, with intent him, the said Charles Joiner, to maim and disfigure, contrary to the act of the General Assembly in such case made and provided, to his great damage, and to the evil example of all others in like cases offending, and against the peace and dignity of the State; and the jurors aforesaid, upon their oaths aforesaid, do further present, that William Ormond afterwards, to-wit, on the day and year aforesaid, with force and arms an assault did make upon one Charles Joiner, in the peace of God and the State then and there being, and him the said Charles Joiner then and there did beat, wound and ill-treat, and other wrongs then and there did to the said Charles Joiner, to his great damage, and against the peace and dignity of the State."

A motion was made to arrest the judgment upon the first count, which was sustained by his Honor, *Judge Norwood,* who thereupon pronounced judgment upon the second count, that the defendant pay a fine of five dollars, be imprisoned sixty days, and stand committed till the fine (120) and costs be paid. Whereupon the defendant appealed.

Mordecai, for the defendant.
The Attorney-General, for the State.

DANIEL, J. The first count in this indictment is predicated on the second section of the Act of 1791 (Rev., ch. 339), which declares "that if any person or persons shall, on

purpose, unlawfully bite or cut off an ear," etc., "with intent to disfigure such person," etc., shall on conviction, be imprisoned six months, and fined at the discretion of the Court. The count does not set forth that the defendant did *on purpose* unlawfully bite off the ear of the prosecutor. The words, *on purpose*, are in part descriptive of the offense created by the statute. The Court cannot pronounce the judgment demanded by the statute, unless the offense is completely described. *Lembro* and *Hamper*, Cro. Eliz., 147, were indicted for perjury upon 5 Eliz., ch. 9. Exception was taken to the indictment in that it was *falso et corruptive deposuere*, but not *voluntarie*; and although at the end of the indictment it is *et sic voluntarium commissere perjurium*, yet this doth not help it; and for this cause the defendants were discharged. When an indictment is formed upon the statute of Charles II., it must pursue the words of the statute, and allege the offense to be *on purpose*, etc., and that the act was done with the intent to maim and disfigure. 1 East Crown L., 402; *Carroll's case*, 1 Leach, 66. So under the statute 9 George I., ch. 22 (commonly called the Black Act), which enacts that "if any person or persons shall wilfully and maliciously shoot any person in any dwelling-house or other place," etc., the indictment must pursue the words of the act, and charge the offense to be done "wilfully and maliciously," as well as feloniously. In *Davies' case* it was laid to be done "unlawfully, maliciously and feloniously," omitting *wilfully*, and held ill by a majority of the Judges, who considered the words "wilfully and maliciously" as in part descriptive of the offense. 2 Leach, 556; 1 East C. L., 414, 415; *State v. Martin*, 14 N. C., 329. In the case of the *State v.*

(121) *Evans*, 2 N. C., 281, the indictment charged that the said Evans, *on purpose*, unlawfully did bite off the forefinger of the right hand of the prosecutor, with intent, etc. I admit that it is difficult to perceive how it is possible for one person unlawfully to bite off another's ear and at the same time not purpose to do it. But as there are several other offenses besides this mentioned in the same section, either of which could very possibly be unlawfully committed, without *purposing* the act, we think the rule and decisions should be uniform in each and every case that can arise un-

der the section; therefore we are of opinion that the Court did right in arresting the judgment on the first count.

We have examined the second count, and are unable to discover that it is defective. Nor do we discover upon the whole record any defect for which the second count should be arrested. The first count's being defective is no reason for arresting the judgment upon the second count. 1 Chitty Crim. Law, 249; 1 Bos. & Pul., 187; 1 Salk., 384.

PER CURIAM. Judgment affirmed.

Cited: S. v. Parker, 81 N. C., 550.

STATE v. NEGRO WILL, slave of JAMES S. BATTLE.

1. If a slave, in defense of his life, and under circumstances strongly calculated to excite his passions of terror and resentment, kills his overseer, the homicide is, by such circumstances, mitigated to manslaughter.

2. *It seems* that the law would be the same, with respect to killing a master or temporary owner, under similar circumstances.

THE defendant was indicted for the murder of one Richard Baxter, and on the trial before his Honor, *Judge Donnell,* at EDGECOMBE, on the last circuit, the jury returned the following special verdict, viz.:

"That the prisoner Will was the property of James S. Battle, and the deceased, Richard Baxter, was the overseer of said Battle, and entrusted with the management of the prisoner at the time of the commission of the homicide: that early in the morning of 22 January last, on which day the killing took place, the prisoner had a dispute with (122) slave Allen, who was likewise the property of said Battle, and a foreman on the same plantation of which the deceased was overseer; that the dispute between the prisoner and the said Allen arose about a hoe which the former claimed to use exclusively on the farm on account of his having helved it in his own time, but which the latter directed another slave to use on that day. That some angry words passed be-

tween the prisoner and the foreman, upon which the prisoner broke out the helve, and went off about one-fourth of a mile to his work, which was packing cotton with a screw; that very soon after the dispute between the prisoner and the foreman, the latter informed the deceased of what had occurred, who immediately went into his house; that while the deceased was in his house, his wife was heard to say, "I would not, my dear," to which he replied in a positive tone of voice, "I will"; that in a very short time after this the deceased came out of his house to the place where the foreman was, and told him that he, the deceased, was going after the prisoner, and directed the foreman to take his cowhide and follow after him at a distance; that the deceased then returned into the house and took his gun, mounted his horse and rode to the screw, a distance of about six hundred yards, where the prisoner was at work; that the deceased came up within twenty or twenty-five feet of the screw, without being observed by the prisoner; dismounted and hastily got over the fence into the screw yard; that the deceased with his gun in his hand walked directly to the box on which the prisoner was standing engaged in throwing in cotton, and ordered the prisoner to come down; that the prisoner took off his hat in an humble manner and came down; that the deceased spoke some words to the prisoner, which were not heard by any of the three negroes present; that the prisoner thereupon made off, and getting between ten and fifteen steps from the deceased fired upon him; that the report of the gun was very loud, and the whole load lodged in the prisoner's back, covering a space of twelve inches square; that the wound caused thereby might have produced death; that the prisoner
(123) continued to make off through a field and after retreating in a run about one hundred and fifty yards in sight of the deceased, the deceased directed two of the slaves present to pursue him through the field, saying that "he could not go far"; that the deceased himself laying down his gun, mounted his horse, and having directed his foreman, who had just come up, to pursue the prisoner likewise, rode round the field and headed the prisoner; that as soon as the deceased had done this, he dismounted, got over the fence and pursued the prisoner on foot; that as soon as the prisoner discovered he was headed, he changed his course to avoid the

deceased, and ran in another direction towards the wood; that after pursuing the prisoner on foot two or three hundred yards, the deceased came up with him, and collared him with his right hand; that at this moment the negroes ordered to pursue the prisoner were running towards the prisoner and the deceased; that the prisoner had ran before he was overtaken by the deceased five or six hundred yards from the place where he was shot; *that it was not more than six or eight minutes* from the time of the shooting till the slaves in pursuit came to where the prisoner and deceased were engaged; that in a short time the said slaves came up, and being ordered by the deceased, one of them attempted to lay hold of the prisoner, who had his knife drawn, and the left thumb of the deceased in his mouth; that the prisoner struck at said slave with his knife, missed him and cut the deceased in his thigh. That in the scuffle between the prisoner and deceased, after the deceased overtook the prisoner, the deceased received from the prisoner a wound in his arm which occasioned his death; and that the deceased had no weapons during the scuffle. That soon after, the deceased let go his hold on the prisoner, who ran towards the nearest woods and escaped; that the deceased did not pursue him, but directed the slaves to do so; that the deceased soon recalled the slaves, and when they returned the deceased was sitting on the ground bleeding, and as they came up the deceased said: "Will has killed me; if I had minded what my poor wife said, I should not have been in this fix." That besides the wound on his thigh, the deceased had a slight puncture on his breast, about skin deep, and a wound about four (124) inches long and two inches deep on his right arm above his elbow, which was inflicted by the prisoner, and which from loss of blood occasioned his death, and that he died on the same day in the evening; that the prisoner went the same day to his master, and surrendered himself; that the next day, upon being arrested and informed of the death of the deceased, the prisoner exclaimed, *"Is it possible!"* and appeared so much affected that he came near falling, and was obliged to be supported. That the homicide and all the circumstances connected therewith took place in Edgecombe County.

"But whether upon the whole matter aforesaid the said Will be guilty of the felony and murder in the said indictment specified and charged upon him, the said jurors are altogether ignorant, and pray the advice of the Court thereupon. And if upon the whole matter aforesaid it shall appear to the Court that he is guilty of the felony and murder wherewith he stands charged, then they find him guilty. If upon the whole matter aforesaid it shall appear to the Court that he is not guilty of the murder aforesaid charged upon him by said indictment, then the said jurors upon their oaths aforesaid do say that the said Will is not guilty of the murder aforesaid, as the said Will has for himself above in pleading alleged, but that the said Will is only guilty of feloniously killing and slaying the said Richard Baxter." Upon this special verdict his Honor gave judgment that the prisoner was guilty of murder, and pronounced sentence of death; whereupon the prisoner appealed to the Supreme Court.

B. F. Moore, for the prisoner. It is conceded that Baxter occupied the place of master, and, in his capacity of overseer, was invested with all the authority of owner, in the means of rendering the prisoner subservient to his *lawful* commands. With this concession, freely made, it is believed that if the shot of the deceased had proved fatal, he had been guilty of murder, and not of manslaughter only. The instrument used, and the short distance between the parties, (125) were calculated to produce death; and nothing but the want of malice could have deprived the act of any of the features of murder. The disobedience of running from his master on account of threatened chastisement, however provoking, does not justify the death of the slave. It is truly calculated to surprise the master into a sudden gust of passion, and, on this account death inflicted during such a moment may well be mitigated to the offense of manslaughter. But it is only the *surprise* of the passions that will extenuate their transport. Divest the act of all idea of surprise, it then becomes deliberate, and in law there will be no difference between shooting for the disobedience at the moment of running away, and many days thereafter. It is clear, then, that if Baxter's shot had been fatal, he had been guilty of murder

and not of manslaughter. For that he loaded his gun and proceeded to the cotton screw with the intent to shoot the prisoner, if the latter should make off, is manifest from his whole conduct, and particularly so from the fact of his directing the foreman to walk behind at a distance. If he had armed himself for defense, expecting a conflict with the prisoner, he would have summoned his aid and kept it at his heels ready for the encounter. The bloody purpose of shooting had certainly been formed, and the time given him for reflection and the calm concoction of his plans evince a settled design and perfect deliberation. He was not *surprised* into the act of shooting; it was *deliberate; it was expected and intended beforehand,* and therefore murderous. Bevil on Hom., 29; 1 Vent., 158.

It is further believed by the prisoner's counsel that if on firing the shot Baxter had rushed towards him in a threatening manner and the prisoner had turned, being unable to escape, and slain the deceased, the act had been homicide *se defendendo,* and this upon the clearest principles of criminal law.

The prisoner's counsel contends:

First. That if Baxter's shot had killed the prisoner, Baxter would have been guilty of manslaughter at the least. And,

Second. This position being established, the killing of Baxter under the circumstances stated is but (126) manslaughter in the prisoner.

The first position would seem too plain to be argued; but as an opinion appears to be rapidly pervading the public mind that *any* means may be resorted to to coerce the perfect submission of the slave to his master's will, and that any resistance to that will, reasonable or unreasonable, lawfully places the life of the slave at his master's feet, it may be useful to attempt to draw the line, if there be any, between the lawful and unlawful exercise of the master's power. That there is such a line, though it may be difficult in all cases to find it, and fix it with precision, is nevertheless true; and although the court may resolve that in all cases short of homicide they will not look for it, yet, disagreeable and perplexing as the task may be, they cannot avoid the search, so long as a master may be tried for the homicide of

the slave, or so long as the slave may set up any defense for the homicide of his master.

It is not intended to combat the correctness of the decision in *State v. Mann*, 13 N. C., 263, though that case leaves the slave, when his life is spared, in the slender guardianship of the "frowns and execrations" of a moral community against cruelty. That decision is not understood by me as some have expounded it. In declaring that a master cannot be indicted for a battery on his slave, the Court is not to be understood to affirm that he cannot be indicted for *any* offense which necessarily includes a battery. I apprehend the substance of their decision to be that they will take no cognizance of any violence done to the slave by the master which does not produce death. It is true there is a portion of the opinion of the Court which puts the slave entirely out of the pale of the law, and secures the master in a despotic immunity. In page 266 the Court say, "such obedience is the consequence of only uncontrolled authority over the body; there is nothing else which can operate to produce the effect; the power of the master must be absolute to render the submission of the slave perfect. In the actual condition of things it must be so: there is no remedy; this discipline belongs to the state of slavery; they cannot be disunited without abrogating at once the right of the
(127) master and absolving the slave from his obligation."

These expressions, it must be admitted, are clear beyond cavil in their meaning; and that they were selected to convey, with great accuracy, the opinions of the learned Judge who used them, may be well argued from the frank confession which he avows of their abhorrence. In truth, they do outlaw the slave, and legalize his destruction at the will of his master. It is believed, however, that they were never intended to cover the entire relation between master and slave. If they were, it is humbly submitted that they are not only startling and abhorrent to humanity, but at variance with statute law and decided cases. Uncontrolled authority over the body is uncontrolled authority over the life; and authority, to be uncontrolled, can be subject to no question. Absolute power is irresponsible power, circumscribed by no limits save its own imbecility, and selecting its own means with an unfettered discretion. Absolute power

is exempt from legal inquiry, and is absolved from all accountability for the extent or mode of its exercise. During its operations it acknowledges no equal who may check its will, and knows no superior afterwards who may rightfully punish its deeds. The language of the Court does most strictly and precisely describe the relations of master and slave which subsisted in ancient Rome, and does now subsist in modern Turkey—a relation which this Court in the case of the *State v. Reed*, 9 N. C., 454, did most emphatically denounce as inhuman, unsuited to the genius of our laws, and unnecessary to protect the master in his legal rights. In that case *Judge Henderson* fixes the true boundary of the master's power. It extends, says he, to securing the services and labors of the slave, and no farther. And he expressly declares that a power over the life of the slave is not surrendered by the law, because the possession of such a power is noways necessary to the purposes of slavery, and that his *life* is in the care of the law.

The idea of the *perfect* submission of the slave is in true accordance with the policy which should regulate that condition of life, wherever it may exist. But whether it will more certainly result from the *absolute* power of the owner than from a *large* but *limited* authority, is (128) questionable indeed. More especially, if it be true, as argued in the opinion already referred to, that the absolute power of the master, although left unrestrained by law, is checked and fettered by what is stronger than law, the irresistible force of public sentiment. If that force is now setting in a counter-current against the license of absolute power, either it is to be deprecated and stopped, or absolute power is most clearly proved to be unnecessary to the ends of slavery. The courts of the country should foster the enlightened benevolence of the age, and interpret the powers which one class of the people claim over another, in conformity, not with the spirit which tolerates the barbarian who is guilty of savage cruelty, but with that which heaps upon him the frowns and deep execrations of the community. All domestic police must be regulated by the feelings and views of those who dispense it. If it be true, then, that public sentiment will no longer tolerate excessive cruelties from the master, as is said by *Taylor, Chief Justice,* in

State v. Hale, 9 N. C., 582; by *Henderson, Chief Justice*, in *State v. Reed*, 9 N. C., 454; and by *Ruffin, Chief Justice*, in *State v. Mann*, 13 N. C., 263; and if it be true, likewise, that the relation between master and slave is to be discovered from the opinion and feelings of the masters, we cannot hear, without surprise, that it is necessary in the actual condition of things to clothe the master with an uncontrolled and absolute authority over the body of the slave. If such necessity *now* exists, the rhetorician hath spoken, and not the Judge. If such necessity does not exist, the power is given for abuse, and not to accomplish the objects of slavery. It would seem, really, that whilst the courts are lauding the Christian benevolence of the times, manifested by the humane treatment of the slaves, they are engaged in investigating to what possible extent the master may push his authority without incurring responsibility. They feel shocked at the discovery they make themselves, but rise from their labor with the consolation that few are so abandoned to a sense of public indignation as to enjoy the revealed prerogative. If the expression could be divested of the appearance of sarcasm, some truth might, perhaps, be
(129) found in the assertion that the great result of their disclosure has been to teach the kind master how merciful and moderate he is in the midst of such plenitude of power; and the cruel one, how despised and desecrated he will be if he use its legal license. Good men will feel no pleasure in the revealment, bad men will be freed from the check of ignorance.

It is further said in the *State v. Mann* "that the slave, to remain a slave, must be made sensible that there is no appeal from his master, that his power *in no one instance is usurped.*" The language here is equally explicit, and altogether as strong, as that before quoted. It denies to the slave the smallest attribute of a rational or feeling creature. It not only represses thought, and extinguishes all power to deliberate on any command of his master, however repugnant to natural justice it may be, and whether its execution is to affect himself or others; but it professes to control into perfect tameness the instinct of self-preservation. It would be difficult, and if it were easy, it would be lamentable, to

accomplish the former; but it would be impossible to effect the latter. Such insensibility to life would defeat the very object of its inculcation, the value of the slave. For we can never hope to regulate this powerful instinct of nature with an adjustment which will quietly yield all its love of life into the hands of a ferocious master, and yet preserve it against the world beside. But if it were desirable so far to annihilate it, the task is beyond the reach of human ingenuity, and not to be accomplished by the possession of absolute power, however fearfully enforced or terribly exercised. The relation of master and slave may repress all the noble energies and manly sentiments of the soul, and may degrade the moral being into a brute condition; and when this is done, we shall not be astonished to see the moral brute exhibiting the instinct natural to brute condition. How vain must it always be, when we shall have reduced humanity to its ultimate capability of degradation, to expect any embellishment of mind to adorn the wretched existence. If the relation require that the slave should be disrobed of the essential features which distinguish him from the brute, the relation must adapt itself to the consequences, and (130) leave its subject the instinctive privileges of a brute.

I am arguing no question of abstrict right, but am endeavoring to prove that the natural incidents of slavery must be borne with, because they are inherent to the condition itself; and that any attempt to restrain or punish a slave for the exercise of a right, which even absolute power cannot destroy, is inhuman, and without the slightest benefit to the security of the master, or to that of society at large. The doctrine may be advanced from the bench, enacted by the Legislature, and enforced with all the varied agony of torture, and still the slave cannot believe, and will not believe, "that there is no one instance" in which the master's power is usurped. Nature, stronger than all, will discover *many* instances, and vindicate her rights at any and at every price. When such a stimulant as this urges the forbidden deed, punishment will be powerless to reclaim or to warn by example. It can serve no purpose but to gratify the revengeful feelings of one class of people and to inflame the hidden animosities of the other.

With great deference to the opinion already commented on, it would appear to me that a conclusion directly the reverse, as to the necessity of absolute power in the master, should have been drawn from the premises. The slave can only expect to learn the law of the land, as respects the power of the owner over him, from the manner in which it is generally, and almost universally, administered by the owner. If their treatment is now so mild, or becoming so, as rarely to require the interposition of any tribunal for their protection, they will soon be taught by the conduct of their masters, if not already taught, that absolute power is not the master's right; and the consequence which may be expected will be that the slave will be prepared to resist its exercise, when bad men attempt to commit the cruelties allowed by it. So important is it that the Court should, as far as possible, conform their exposition of the rights of men with those sentiments of the public which, by the Court, themselves, are admitted to be wholesome and just. And especially should they do so when those rights are
(131) constituted by public opinion, and almost exclusively by that alone.

Whatever be the power, however, which the master may possess, it is given with the sole view to enable him to coerce the services of the slave, and all experience teaches us that a power over the life is not necessary to effectuate that end.

The usual modes of correction are found to be altogether sufficient. Punishment short of death serves the end of the master, both as a corrective and as an example. Power over the life of the slave being therefore unnecessary, ought not to be conceded. The use of highly dangerous weapons in cases of simple disobedience is not tolerated by the law, because they are calculated to produce death.

If the deceased had been *resisted*, a great degree of force might have been used, and the law would not have been scrupulous in determining the excess. If he had been chastising the prisoner, in the ordinary mode, and death had ensued, it would have been nothing more than an unfortunate accident. But the prisoner was neither resisting his master nor did the calamity grow out of any attempt to chastise. It is confidently contended that a master has not

by the law of the land the right to kill his slave for a simple act of disobedience, however provoking may be the circumstances under which it is committed; that if the slave be required to stand, and he run off, he has not forfeited his life. This is conclusive, if the law will never *justify* a homicide, except it be committed upon unavoidable necessity, and will never excuse one except it be done by *misadventure* or *se defendendo.* There is no principle in criminal law which will justify or excuse the death that has been caused through the provocation of the passions alone.

This Court has repudiated all idea of similarity between the relation of master and apprentice, as understood in the English law, and that of master and slave, as understood in ours. I cannot perceive the propriety of such total repudiation. The foundation of both relations is the same, to-wit, service; and although the slave may stand in a lower grade than the mere apprentice, and be more dependent on his master, yet it is submitted that the difference (132) is in the *degree* and not in the *nature* of the authority which the master of the one or the other may exercise. This seems to have been the idea of *Justice Blackstone,* who, in speaking of homicide by parents and masters, caused by immoderate correction, proceeds, "thus by an edict of the Emperor Constantine, when the rigor of the Roman law began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment; and if death accidentally ensued, he was guilty of no crime; but if he struck him with a club or a stone, and thereby occasioned his death, or if in any yet grosser manner (as by shooting) *immoderate suo jure utatur, tunc reus homicidii sit.*" 4 Bl. Com., 183.

It is not my purpose, however, to place the slave and apprentice on the same footing. It is freely conceded that there is a great difference between the two conditions, and that many cases of homicide committed precisely under the same circumstances would be murder of an apprentice, and only manslaughter of a slave. Thus the master has the right to beat his apprentice as well as his slave, but the principle is universal, with a solitary exception, that a man having the right under a given provocation to lay hand upon another, but using a weapon calculated to produce death, and death

ensuing, is guilty of murder. The exception alluded to is the slaying an adulterer caught in the act. Bevil, 48. Now if an apprentice disobeys, and runs from his master in order to escape chastisement, and the master shoots and kills him, it is murder. Bevil, 51, 52 and 53, and 62, sec. 2. Surely the slaying of the slave under the *same* circumstances, after full allowance for the difference in their grade of life, can be nothing less than manslaughter. If the law, for the purposes of policy, will not permit the master to be called to account for batteries, however cruel or unjust, done on the body of his *slave,* as it does in the case of an *apprentice,* yet when it is obliged to examine the extent of the master's powers by reason of a death, then it will apply the same reasonable rules in investigating the master's guilt and the slave's conduct and rights which it applies in the
(133) case of slaying an apprentice, suiting the rule to the difference of condition. *State v. Tackett,* 8 N. C., 217. If, indeed, the master may not be called to account till the death of his slave, if he have this wide scope of authority, to be exercised upon his own discretion, it is highly reasonable that when he is called to account the examination should be rigorous, for it is the only protection which the slave can claim at the hands of the law, and therefore ought to be strict, in order that it may be the more efficient. It is here alone that the slave, in the eye of the law, ascends from the level of mere property and takes an humble stand amid his species. Here he is regarded as a rational creature. *State v. Scott,* 8 N. C., 25. *State v. Reed,* 9 N. C., 454. The necessity of averring that he is property, and whose property, as is requisite in indictments for the batteries of slaves, is here dispensed with; and from this distinction alone it would appear that the courts, in the very form of the indictment for murder, have not recognized the exemption of the master from the accountability common to the world beside for the death of a slave. *State v. Mann,* 13 N. C., 264.

The prisoner was shot in the act of making off from his overseer, who was prepared to chastise him. A master's authority to apprehend his slave cannot be greater than that of a constable or sheriff to arrest for a misdemeanor; and a constable may not kill in order to prevent the escape of one guilty of that grade of offense. The law has so high a re-

gard for human life that it directs the officer to permit an escape rather than kill. Bevil, 119, sec. 4, 165. If the officer act illegally, by abusing his authority, or exceeding it, resistance unto death is not murder. *Ibid.,* 194. But if the master have greater authority to apprehend his slave than a law officer hath to arrest, under a precept, for a misdemeanor, he certainly has not greater than a sheriff, acting under a precept, hath to arrest a felon. Here the law again shows its tender and noble regard for human life and its detestation of the shedding of human blood. The officer is not allowed to kill a felon, a murderer, or a traitor, unless his escape be *inevitable.* Bevil, 114, sec. 1; 117, sec. 2. "And in every instance in which one man can be justified in killing another the abuse of his power (134) makes him guilty of manslaughter." *Ibid.,* 78. An officer, therefore, having the right to kill a felon, in order to prevent his escape, and doing so when the escape may be prevented by more lenient means, is guilty of manslaughter. *Ibid.,* 114, sec. 1. This necessity must always be proven. It is never presumed. No such necessity appears in the finding of the jury. In legal contemplation, therefore, it does not exist.

The law enjoins it as a duty on the officer to kill a felon, rather than permit his escape, upon the presumption, I suppose, that if he do escape, he will forever elude the penalty of his crime. Such is not the case with a runaway slave who, in general, may be certainly recaptured. No one will be found to maintain that it is the duty of the master to kill his slave rather than suffer his temporary escape. The prisoner was in the act of *disobedience,* and not of *resistance,* between which there is a substantial difference. Act of 1791; Bevil, 114.

The deceased, then, greatly exceeded his authority, whether the prisoner is to be considered in the light of an apprentice, of one who had committed an aggravated misdemeanor, or even in that of a felon, and if death had ensued, I conclude that he would have been guilty of manslaughter at the least.

This brings us to the important question in this case. Was the prisoner *justly* so provoked by the shooting *as under the influence of ordinary human frailty* to cause his reason

to be dethroned, and to be deprived of deliberation? Or, in the language of *Judge Haywood*, in *State v. Norris*, 2 N. C., 495, "was not the prisoner thereby deprived of the free and proper exercise of his rational faculties, owing to the fury of resentment, not unreasonably conceived?" If he was, that ends the question. Was it such a provocation as, allowing for the disparity of the free and slave condition of men in this country, was well calculated, even in minds tolerably well regulated, to throw a man off his guard, and excite a furious anger? If so, the *State v. Merrill*, 13 N. C., 279 (*Ruffin's* opinion) determines the fate of the prisoner. An appeal to human nature in its most degraded state, (135) will answer, unhesitatingly, it was. No man can reason and respond otherwise. And it appears to me that an appeal to the principles of law, as founded in the nature of man, and recognized for centuries, will leave not a particle of doubt. Can the prisoner be guilty of murder? Who can review the circumstances of the case and in his candor pronounce that they carry in them "the plain indication of a heart regardless of social duty, and fatally bent upon mischief"? If his case can be made to reach this standard definition of murder, what bosom is there which does not luxuriate in the poison of murderous thought? And in vain may nature plead her wrongs and the tempest of the passions to excuse the indiscretion of her fitful moments. It may be murder; but if so, it must find its guilt, not in the human disposition, but in a policy that knows no frailty and shows no mercy. That policy is yet to be declared. I will not suppose its intended application to this case, and I shall, therefore, for the present, take the liberty of discussing the defense upon the received principles which define murder, and distinguish it from manslaughter.

Murder is the felonious killing of a human creature with deliberation. The act must have three intents: 1. An intent to kill or hurt. 2. An intent to kill or hurt *unjustly*. And, 3. The intent must be *deliberate*. It is only necessary in this case to consider the deliberation of the intent; for it is admitted that the intent of the prisoner was to kill or hurt, and that it was unjust; but it is denied that it was *deliberate*.

The intent is not deliberate if there be provoking cause. Bevil, 28, sec. 1; 34, sec. 3. The mischievous vindictive disposition, essential to constitute the crime of murder, is implied from the want of *legal* cause of provocation. The greatest care should be taken not to confound a *vindictive* act and such an act shows a vindictive *disposition.* Bevil, 41, and note. Every case of manslaughter, perpetrated in anger, is a vindictive act; whilst every case of murder exhibits the vindictive disposition. A vindictive act simply is the result of ordinary frailty; a vindictive disposition is the attendant of extraordinary depravity. The former comes of a surprise of the passions; the latter mar- (136) shals, stimulates and leads the passions.

Manslaughter wants one of the above intents which define murder. It implies an intent to kill or hurt, and that the intent is unjust, but supposes the absence of deliberation, or the presence of a *justly* provoking cause. (Cases illustrative of this definition, Bevil, 64, 65; 67, secs. 5, 68; 74, sec. 2; 76, sec. 3. *Stedman's case*, p. 80. *Carey's case*, p. 124). But what is justly provoking cause? In our search for the meaning of the expression we cannot consult the vague notions of men as to insults. There would not only be no certainty in them as a guide, but they would strip men of all security for their lives. We must appeal to the common law, as it has recognized excusable frailties. Its principles, being bottomed on human nature civilized by legal restraints and legal privileges, adapt themselves with a happy facility to all the changes and modifications of society and to all the mutations in the relations of its parts. These principles having discarded the idea of legal provocation from words, have resolved the foundation of their existence into the protection of the person.

Self-preservation, being a prime law of nature, and indispensable to the first and permanent interests of society, the instinct is fostered instead of being checked. The policy of the law to cherish it is what dispenses indulgence to an excess of force requisite to preserve it, and palliates an unnecessary homicide. If human institutions could so blunt this sense as to effectuate a law which should forbid blow for blow not threatening death, the introduction of slavery, to a great degree, would be already prepared. If, however,

the degradation should stop at this point, still there would be a very ample scope for this powerful sense to act in, and a dangerous attack, or a blow menacing death, being out of the customary sufferance, would call up, in vigor, the unsubdued though mutilated sense, and surprise it into action. It is not the *object* of the law, in its regulation of the relation of master and slave, to destroy any portion of the instinct of self-preservation. On the contrary, it would be rejoiced to preserve it entire, but this is inconsistent with the subjection of the slave, without which he is valueless. If (137) this instinct were permitted to be displayed by the slave, as by a freeman, the authority of the master would be at an end. Hence it is, that when it is not so essential to be curbed, it is allowed to enjoy a wider range; as in respect of strangers who have no right to assume any authority, it is permitted to turn many degrees towards the condition of freemen. And hence it is, too, that whenever the law, for the purpose of sustaining the relations of the several parts of society deemed essential to the peace and safety of the whole, tolerates its partial suppression, it provides the best possible security against any abuse likely to occur because of its required extinction. Thus it gives to the wife the protection of love and identity of welfare; to the child the shield of affection; to the apprentice the guaranty of a penal bond; and to the slave the guard of interest. In the general, in proportion as these securities are weaker, that of the law itself ought to be stronger; and in proportion as the subjection in the one or the other of these relations is required to be greater or less, so must the suppression of this instinct be greater or less. The subjection in the relation of slavery ought to be greater, and so ought the extinction of the instinct to be greater, than in any of the other relations. It is the legal duty of all who are subjects in any one of them to adapt and conform this instinct to the extent necessary to maintain the relation; and if any one do not, he shall not plead its want of subjection in excuse of a deed occasioned by his neglect of duty. If an apprentice, being under a lawful correction, shall resist and slay his master, it is murder and not manslaughter, because the law cannot admit that he was provoked. If a slave be under any correction, with or without cause, from his master, pro-

vided it do not threaten death or great bodily harm, and he resist and kill his master, this is murder likewise, and for the same reason, as the law requires this degree of submission from him. But if the apprentice be unlawfully beaten, and he resist and kill his master, it is not murder, because the law hath not required him to extinguish his instinct of preservation to such an extent, and therefore it admits that he was provoked; so if a slave be beset by his master in a manner to threaten death, and he (138) slay his master, this cannot be murder, because the law hath not required him to extinguish his instinct to so great a degree, and therefore it admits that he was provoked. In a word, in those bounds within which the law has enjoined it as a duty to curb the instinct of self-preservation, we are not allowed to display it, and if we do, the law cannot hear the defense of provocation; but all display of it out of those bounds is admissible and is the effect of *legal* provocation. The law demands it as a duty that we should tame our passions to suit the condition which it has assigned us. It supposes that this duty will become habitual, and consequently of easy performance; that we will conform ourselves to its requirements. This, and this alone, is the true foundation of all the distinction between the master and the apprentice, between the freeman and the slave.

But having conformed ourselves to a given and required degradation, to an enjoined submission, we are ready by our very nature and habits to resist any degradation or submission greatly beyond that which we have learned to acquiesce in as a *duty*. When a slave is required to bare his back to the rod, he does it, because it is usual; but when he is required to stand as a target for his master's gun, he is startled: no idea of duty sustains the requirement, and the unquelled portion of his instinct rouses his passions to resistance.

Human institutions are inadequate to the task of settling a condition in society which shall impart to its members the highest perfection of philosophic fortitude and the lowest degradation of animal existence, which shall blend into harmony the reasonable man and the passionless brute.

When it is declared that a slave is a reasonable or human creature, as in *State v. Scott,* 8 N. C., 24; *State v. Hale,*

9 N. C., 582, and *State v. Reed,* 13 N. C., 263, and that he is the subject of felony at common law; that murder and manslaughter both may be perpetrated on his person; that himself may commit both; it would seem to result that he was acknowledged to possess the human infirmities common to his species. That they must be palliated in some cases, (139) even when the master is the victim, I hope I have satisfactorily shown. And I now come to the deliberate conclusion that the only difference caused by the relation consists in the fact that there are some acts of the slave which constitute provocation, that would not, if done by a freeman; some which would constitute provocation to the *master* which would not to a *stranger;* and on the contrary, that a slave is not permitted to be provoked at many acts done by a stranger freeman which would constitute a lawful provocation if done by a fellow slave; and that a great variety of acts done by the master shall not be sufficient cause of provocation, which, if done by a stranger, would so be deemed. But that not in a *single* relation in which the slave is placed by the law is he debarred in *every* case of violence to his person, from feeling and pleading a legal provocation.

If I have been successful in showing that the deceased greatly abused his authority by shooting at the prisoner, and that the act was calculated to produce a resentment not unreasonably conceived, the inference in law is irresistible that if the prisoner, immediately on being shot, had turned and slain the deceased, it could not have been more than manslaughter; and the only important point now remaining to be discussed is whether the interval of time between the reception of the injury and the commission of the homicide enhances the guilt of the deed. The law would be vain and nugatory as a rule of action if it should allow that the passions may be justly provoked, and yet refuse to allow a reasonable time for their subsidence. When it says that reason may be dethroned, it is never guilty of the solecism of holding the judgment accountable till reason can be reseated. Whether there may have been sufficient time for that important operation of the faculties is a question often dependent on the circumstances of the case. The continuance of the original exciting causes and the addition of subsequent stimulants, being necessarily calculated to prevent the restoration

of reason, may prolong the time till they cease to exist; nor even then, at the *very* moment of their cessation, does the law demand that the bosom shall return to its calm and tranquillity. Such an instantaneous repose is no more (140) to be looked for, in the tempest of the passions, than it is in the storms of the ocean, whose angry waves are often seen to run mountain high, long after the dark cloud hath passed away and the raving wind hath fled from the conflict, leaving its enraged victim heaving with agitation beneath a tranquil and sunny heaven.

The time in this case was but six or eight minutes, and the wound calculated to produce death. If the exciting cause of provocation had here ceased, it would be a rigid and unnatural rule to require, at the expiration of this short period, the presence of a responsible judgment; for it is perfectly apparent that in proportion to the severity of the injury received will be the length of time which nature demands to adjust the shaken balance of the mind. The prisoner had much cause to suspect that his wound would prove fatal; and no man, either bond or free, laboring under the excitement incident to such a situation, could so soon have quelled his fury and recalled his scattered senses. But these few moments were not allowed to be moments of rest and thought to the wounded man. They were moments of flight and active pursuit—flight by a man dangerously shot, his wounds bleeding in profusion, and chafed into agony by the friction of his clothes and the motions of his body; pursuit by a man who had meditated and attempted a deadly injury, who called to his aid three more men, ready to execute his purposes, whatever they might be; who was well aware of the mangled condition of his victim, and who, under the full conviction of his shot proving fatal, cheered his comrades of the chase by the unfeeling exclamation, "He can't run far." Let it be remembered, too, that the prisoner, during this space of time, had run a distance of five or six hundred yards; that he was overtaken by a man who, in moments perfectly cool, when compared with those in which he captured the prisoner, had not hesitated to shoot him at a dstance of a few rods, and by what logic can we arrive at the conclusion, either that the prisoner had enjoyed opportunity to regain his judgment or that he had not every reason to apprehend from the deceased

the finishing stroke to his life? How could he be
(141) trusted, with every passion inflamed to madness, who, in cooler times, had violated every duty; as a man, had deliberately prepared himself to take the life of his fellow-man; and, as a superintendent, had, for trifling cause, attempted to destroy valuable property entrusted to his care? In no part of the slave's conduct does he evince a disposition to seek a conflict. He takes every occasion to avoid it. When he is headed, he does not hesitate to turn his course and flee from an encounter.

Upon the whole, I cannot bring my mind to the conclusion that this case is of higher grade than manslaughter, if of that; and whatever may be the prisoner's fate, I am free to declare, and with the most sincere candor, that I do not recognize in his conduct the moral depravity of a murderer, nor any high degree of inaptitude to the condition of slavery. He was disobedient, it is true, and ran to avoid chastisement. Three-fourths of our slaves occasionally do this. He slew his overseer, it is true, after having been dangerously shot, pursued and overtaken. The tamest and most domestic brute will do likewise. And I feel that if he must expiate the deed under the gallows he will be a victim, not of his own abandoned depravity, but a sacrifice offered to the policy which regulates the relation of slavery among us. But before he is sacrificed it may be useful to inquire into that policy. The interests of society demand that it should be fixed, and *permanently* fixed, that the master may know the extent of his authority, and the slave prepare himself to its accommodation.

No question can be more delicate, or attended with so many bad consequences if settled in error. It would be next to impossible for the judiciary to adjust this relation adversely to any strong and deliberate opinion entertained by the public mind. The momentum of this feeling acting through the juries of the country and the spirit of the Legislature would be too powerful successfully to be encountered by the courts. And in whatsoever decided current it might run, it would finally bear into its channel all interpretations of the law.

By a timely and judicious administration of the law, however, in relation to this subject, the courts may effect

much in the formation of public opinion, and at this (142) time they may exert the opportunities afforded by their situation in a most happy manner to impart fixedness and stability to those principles which form the true basis of the policy. They have of late frequently announced from the bench the progression of humanity in the relation, and their clear conviction that the condition of the slave was rapidly advancing in amelioration under the benign influence of Christian precepts and the benevolent auspices of improving civilization. It is believed that these convictions were founded in truth, and the various laws on the statute-book bring ample testimony to the fact. As far as slavery has been the subject of legislation for the last ninety years, it has been undergoing a gradual revolution in favor of the slave, and, it is confidently asserted, not adverse to the best interests of the master or of the security of the public. In a popular government we can nowhere look for more correct information of the state of the public mind, upon a subject deeply interesting to the people at large, than in their laws. The history of the legislation of the State for the last century on this subject, during which more than a dozen principal acts have been passed at intervals, is a history of a gradual progression in the improvement of the condition of the slave, in the protection of his person, his comforts, and those rights not necessary to be surrendered to his master. The length of time in which this evidence of a common sentiment has been continuing in one course is irrefutable testimony of its being the true and deliberate sense of the community. Very lately the whole subject came before the Legislature; and though it was at a time when the public mind was inflamed and alarmed at a recent and yet reeking massacre, they did not relax the laws made for their protection nor render their lives or persons less secure. From the Act of 1741, which put the life of the slave on trial in the hands of three justices and four freeholders, down to that of 1831, which secures, beyond doubt, the right of the slave to a jury of slave-owners, there will be found, without a solitary retrograde, one continued, persevering and unbroken series of law, raising the slave higher and higher in the scale of moral being. To the period of 1794 the character (143) of the acts, though they are not numerous nor strongly

marked with exclusive benefit to the slave, is evincive of an intent to afford protection where before it was weak. From that period, however, it may not be uninteresting to furnish a brief synopsis of them, in a case so important as this. (Here the several acts alluded to were reviewed.)

It is not possible that there can be found anywhere a plainer manifestation of a decided intent to raise the consideration and standing of the slave than is here exposed in the foregoing acts of the Legislature. Will the Court disappoint this unequivocal intention? Will they rebuke the spirit of the age and strike back this unfortunate race of men, advancing from the depths of misery and wretchedness to a higher ground, under the shield of so much legislation enacted in their behalf?

Our laws furnish incontestable evidence of what *is* the enlightened sentiment of the State. The history of other nations affords a body of luminous information to instruct us what that sentiment *should* be; and I feel no small pleasure in believing that the legislative policy of our past and present day most fully accords with that course which the long-tried experience of bygone ages has distinctly marked out as the wiser and better one.

Upon this subject the Baron Montesquieu has gathered the choicest materials of every age, clime and nation. With a mind formed in the mould of patience itself, strong by nature and enriched with a philosophic cultivation, he hath executed the task of analysis with the most profound and discriminating sagacity. With no object in view but the advancement of political knowledge, he hath unmasked all the forms of government, traced to the fountain the principles of their action, and exposed to the meanest capacity the deep and hidden reasons of all the diversified relations of man, and the true genius of the laws necessary to support them.

In his Spirit of Laws, vol. 1, p. 291, *et seq.*, to 298, he treats of the subject of slavery, and informs us, as the result of his inquiries, that in governments whose policy is
(144) warlike and the citizens ever ready with arms in their hands to quell attempts to regain liberty, slaves *may* be treated with great rigor and severity, without the hazard of servile wars; but that in republics where the policy is essentially pacific and the citizens devoted to the arts of

peace and industry, the treatment of slaves *should* be mild and humane; that the power of the master should not be absolute, and that the slave should be put within the keeping of the law. If that candid and ingenious writer be not deceived in his conclusions, he has given us a hint for the regulation of our domestic servitude, the neglect of which may lead to the most fatal sequel. Our government is, perhaps, the most pacific on earth, and the citizens most addicted to the pursuits of civilized life. How inconsistent, then, will it be in us to adopt a policy in relation to our slaves which must be either yielded up or must change the habits and character of our people, and ultimately our form of government, with the blessings of liberty itself.

We may not expect that the danger of servile wars will only operate to arm the citizens, generally, in their own defense. The recent insurrection may show, indeed, the formation of numerous companies of yeomanry for the purpose of being always ready to meet and vanquish the earliest movements of insurrectionary slaves; but a little observation at this time—so soon, too, after the panic that gave rise to these preparations—will serve to show that at the present moment there remains scarcely a single one of the many associations which were then formed. They grew up with the panic, and they have vanished with it. It must be apparent, then, if ever-ready arms are necessary to our safety, they must be lodged in hands not filled with other occupations, but responsible to the public for efficiency and dispatch. In other words, if a display of force be requisite to chain down the spirit of insurrection or stop the bloody career of its actual march, a standing army, which will leave the great body of citizens to pursue their favorite occupations of peace in perfect security, will be the loud demand of the community. How certainly such a permanent association of armed men, first formed to preserve the relations of our slavery, will ultimately introduce a civil slavery over the whole land, the experience of other nations and the (145) warning of our own Constitution will most fearfully answer. I know it has been frequently said, and with some it is a favorite idea, that the more cruel the master the more subservient will be the slave. This precept is abhorrent to humanity and is a heresy unsupported by the great mass of

historic experience. The despair of individuals cannot last forever; neither will that of a numerous people inflicted with common wrongs and exchanging a common sympathy. Rome had no servile wars till her masters had outraged every feeling of justice and benevolence and made their slaves drink the cup of unmitigated cruelty to its last drop; nor had she any, that I remember, after the first Christian prince of the empire had relaxed the intolerable degradations of that unfortunate class of her people.

I feel and acknowledge, as strongly as any man can, the inexorable necessity of keeping our slaves in a state of dependence and subservience to their masters. But when shooting becomes necessary to prevent insolence and disobedience, it only serves to show the want of proper domestic rules, but it will never supply it; and never can a punishment like this effect any other purpose but to produce open conflicts or secret assassinations.

In adjusting the balance of this delicate subject let it not be believed that the great and imminent danger is in overloading the scale of humanity. The Court must pass through Scylla and Charybdis, and they may be assured that the peril of shipwreck is not avoided by shunning with distant steerage the whirlpool of Northern fanaticism. That of the South is equally fatal. It may not be so visibly seen, but it is as deep, as wide and as dangerous.

Mordecai, for the prisoner. 1. Had this been a case of homicide committed by one free white man upon another, occupying the same station in society, it would have been clearly a case of justifiable homicide. To arrive at this conclusion it is merely necessary to refer to the facts found by the special verdict.

2. If this would be the case between equals, let us (146) next consider it as occurring between freemen not standing upon an equal footing, but between a superior and an inferior, a master and his apprentice, or between persons one of whom has a right to command the services of the other, and chastise him for the purpose of enforcing obedience to his commands.

The distinction in cases of this kind seems to be this: Where the party having the right to chastise the other uses

no *unlawful* or *deadly* weapon in inflicting the chastisement, and does not appear to aim at his life, there, if death ensues, it will be murder or manslaughter, according to the degree of violence used. *Vide Nailor's case,* 1 East P. C., 261, 277. But if the party undertaking to chastise or punish uses a weapon likely to produce death, and death ensues, he is guilty of murder if he slay the other. Bevil, 48, 74, 75, 76. Or if he be slain under such circumstances, the slayer is excusable. *Vide Nailor's case, ubi supra.*

3. If this be the true distinction as between freemen, and it is confidently believed to be so, let us next inquire what difference is produced by the circumstances of the slayer being a slave and the party slain occupying the relation of master.

Slaves seem formerly to have been regarded in this State as mere chattels, and not only the master or owner, but any person might kill them, however maliciously, without subjecting himself, in the case of the master or owner, to any penalty whatever; and in the case of a stranger, to no other than a civil action from the master to recover the value of the slave. We accordingly find the act of 1741, which is the first act on the subject of killing slaves, after providing a remedy for the owner for the loss of a slave killed in dispersing an unlawful assembly of slaves, saves to the owner his right of action against any one killing a slave contrary to the provisions of that act, evidently regarding it as no offense against the criminal law. And this view is also taken by *Hall, J.,* in *State v. Boon,* 1 N. C., 191, in which he held that killing a slave was no felony at common law.

The first action of the Legislature making it an offense against the criminal law was in 1774, when, by an act, the preamble of which recites that "Whereas, (147) doubts have arisen with respect to the punishment proper to be inflicted upon such as have been guilty of wilfully and maliciously killing slaves," it is enacted that for the first offense the offender shall suffer twelve months' imprisonment, and for the second shall be guilty of murder and suffer death without benefit of clergy. The second section provides that he shall pay the owner of such slave, on the first conviction, such sum as may be assessed to be his value,

still evidently regarding it more as a loss of property than as an offense against the criminal law.

Such continued the law until the year 1791, when the Legislature seems to have become ashamed of their previous legislation on this subject, and by an act, the preamble of which recites "that the distinction heretofore drawn between the murder of a white person and one who is equally a *human creature,* but merely of a different complexion, *is disgraceful to humanity and degrading in the highest degree* to the laws of a free, Christian and enlightened country," the same punishment is imposed for the wilful and malicious killing of a slave as for that of a freeman. It is true this act, owing to the vague and uncertain terms in which it was couched, was never carried into execution. Still it is evidence of the change of opinion and policy which had taken place in the community as to this unfortunate class of beings at that day.

Divers other acts ameliorating the condition of slaves, removing them from a level with brutes and advancing them more nearly to a level with the whites, were passed between that time and the year 1817; still it will be found that no legislation had yet made or attempted to make any other than the wilful and malicious killing of slaves indictable. Accordingly, in *State v. Piver,* 3 N. C., 79, the prisoner, though admitted to be guilty of the *manslaughter* of a slave, was discharged, the Court holding that no punishment was affixed by law to that offense. And the same doctrine is recognized by *Taylor, C. J.*, in *State v. Tacket,* 8 N. C., 217.

In the year 1817, however, the Legislature, determining to abolish the last remnant of that barbarous and in-
(148) human spirit which had previously characterized their legislation, placed the killing of a slave on the same footing, under like circumstances, with the killing of a freeman.

Our courts, too, in further pursuance of this liberal and enlightened spirit, in 1823 (*State v. Reed,* 9 N. C., 454), held (contrary to the opinion of one of its members, as delivered in *State v. Boon,* 1 N. C., 191) that the murder of a slave was indictable at common law; and still further, in *State v. Hale,* 9 N. C., 582, that an unprovoked battery committed by a freeman (not being the master) upon a slave was indictable.

These various acts, both legislative and judicial, have been adduced for the purpose of showing that, however a mistaken policy or want of humanity may have actuated the proceedings of the former branch, or influenced the decision of the latter, in the earlier stages of our society, these feelings and opinions no longer prevail; that slaves are no longer regarded as mere brutes or chattels, but that they are now viewed, both in the eye of the law and of society, as *human beings,* liable to be operated upon by the same passions, subject to the same infirmity, and under the protection of the same laws with the white man. If, then, he be *a human being*—and that he is, is declared (if a judicial decision upon this point be required) by the Act of 1791, by *Johnston* and *Taylor, Judges,* in *State v. Boon;* by *Henderson, J.,* in *State v. Reed,* and again by *Taylor, C. J.,* in *State v. Hale;* if he be a human being, a reasonable creature, within the protection of the law, are not the same rules of construction to be applied in his case in ascertaining his guilt or innocence? Should not the same allowance be made for the infirmity of his nature, the operation of his passions, the excitement of his feelings, that is made in the case of a white man? Kept by the stern policy of our laws in a state of ignorance, rude and uncultivated, without any of the aid to be derived from education or the mild and benign principles of religion, is it just, is it reasonable to require him to exercise a greater degree of control over his feelings and passions than one who has enjoyed all these advantages?

But it is said that policy and the state of our society require that these rules, which it is conceded (149) will and must be regarded in the case of a freeman, should be laid aside when a slave is the subject of their operation. I ask where is the authority which authorizes such a conclusion? It can be found nowhere. So long as he is admitted to be *a human being* and endowed with the same faculties, he must be treated as such, is liable to the same penalties and entitled to the same clemency in passing upon his offenses that other human beings are.

That his passions are not subject to be aroused by the *same causes* and circumstances which would arouse those of a freeman is freely and fully conceded; but to say that *no circumstance,* however aggravating, *no injury,* however great, *can*

possibly or *ought reasonably* to arouse or inflame his passions, is requiring what the sober judgment and unbiased reason of every honest, conscientious man must tell him is contrary to the laws of nature, and what no human law, however rigorous or severe in its enactments, can possibly effect. All law should be founded on reason; and when we are led to a conclusion so utterly absurd and so manifestly contradictory to reason, it is time that we should look around and at least suspect that we have mistaken the meaning of a law which leads us to such results.

I have before stated (what will be admitted by all) if this homicide had been committed by one freeman upon another, each of whom occupied the same station in society, or even by a freeman occupying an inferior station upon his superior, that in either case, under the circumstances here found, the slayer would have been justifiable, it now remains to examine what difference is produced by the fact of the slayer being a slave, and the slain his master.

It is not contended, nor is it necessary to contend, that the slave should be placed on the same footing with the freeman, and that the same rules should be applied to him in ascertaining the nature and grade of his offense that would be applied to the freeman. This would be contravening decisions which are now too firmly established to be shaken, and which policy alone requires should be adhered to. But
(150) it is urged that neither policy nor the state of our society requires that so broad and invidious a distinction should be drawn between the two classes as that which would go to establish the principle that the same act which would in the case of a freeman be declared justifiable or excusable should in that of a slave be held the foulest murder.

It is believed, however, that there is no necessity for resorting to either of these two extremes, but that the true rule will be found in the mean between them and in the principles recognized and adopted by this Court in *State v. Tacket,* 8 N. C., 217. Wherever slavery exists, a broad and acknowledged distinction must be marked out and observed between the slave and the freeman; and many acts which, if committed by one freeman upon another, would not mitigate or extenuate a homicide, in the case of a slave will have that

effect. It is impossible, as is said in that case, to define and designate these acts; each case must depend upon its own circumstances. Menacing or provoking language from one freeman to another will not justify an assault, but such provocation given by a slave to a white man will, it is said, amount to a justification. Apply this rule to all other offenses; let it be held also that what in the case of a freeman would be justifiable or excusable homicide will in that of a slave amount to manslaughter, and what would be manslaughter in the freeman is murder if committed by a slave; and in this way, it is believed, a sufficiently broad and marked distinction will be drawn between the two classes to secure the dominion of the one and the subserviency of the other, and at the same time to afford to the slave all necessary protection against acts of lawless violence and outrage. Apply this rule in all its severity to the present case, make all the allowance which can be asked for the difference in the condition of the freeman and slave, and then make the smallest grain of allowance for the weakness of human nature, and it is impossible that this can be pronounced to be more than a case of manslaughter.

But it is insisted that the deceased did nothing more than he had a right to do—used no other means than such as the law clothed him with; in other words, that he stood in the place of master of the slave, and as such had (151) *absolute* power and authority over the body and life of the prisoner, and that the exercise of that authority cannot be called in question by any earthly tribunal. If such be indeed the law, it must follow as a necessary consequence that as the deceased had a right to resort to whatever means his fancy or passion might dictate in the infliction of his chastisement, the prisoner had no right to raise an arm in self-defense, and therefore the offense, being committed by him in the deliberate prosecution of an unlawful act, it must be murder. If such be the law, abject and degraded indeed is the condition of the slave, and fearful must be the punishment reserved by another and an unerring tribunal, to be inflicted upon such as avail themselves of their fancied immunity here, to trifle and tamper with the lives of those whom our laws have placed in a state of such utter and abject subjection. But if such be the law, how could it ever happen

that a master should even be put upon his trial for the murder of his slave, however deliberate, wilful or malicious the act may have been? Yet there certainly have been many instances of masters being tried for the murder of their slaves.

The position here contended for is founded on the expressions used in the opinion of the Court in *State v. Mann,* 13 N. C., 263—expressions strong, certainly, and apparently unequivocal in their support, but which I cannot but believe have been misunderstood in their application, if carried to the extent which is now contended for. It is to be observed that the only question *then* before the Court was as to the liability of the master to answer *criminally* for a battery committed on his slave, and this is all which was intended to be decided. The language used is certainly sufficiently strong to convey the idea that the master has complete, absolute and uncontrolled authority over his slave, but these expressions were used with reference to the matter then before the Court, besides being afterwards qualified by the words "except so far as its exercise is forbidden by statute"; and the *killing* of a slave is clearly forbidden, except where he offers *resistance* to his master, or where death occurs in the infliction of moderate correction. But without the aid of statutory provisions it cannot be conceded that the position here taken is correct. If the Court intended, as it is believed they did, to say that the master possessed full and complete power and authority to secure the services and insure the obedience of the slave, this is admitted; but if this power and authority were held to extend so far as to take the life of the slave, or even to place it in jeopardy, except in the cases before mentioned, it is submitted that no such power is necessary or ought to be granted to the master, that no such authority is conferred by any legislative enactment or judicial determination, but that all our modern legislation and adjudication previously to the case of *State v. Mann* have had a directly contrary tendency.

(152)

The counsel then directed the attention of the Court to the following cases: *State v. Boon,* 1 N. C., 191; *State v. Weaver,* 3 N. C., 54; *State v. Reed,* 9 N. C., 455; *State v. Hale, Id.,* 582. In this last case *Taylor, C. J.,* recognizes the master's complete authority for all purposes necessary to enforce

the obedience of the slave, and says that the law will not *lightly* interfere with the relation thus established. But if a case be brought before the Court in which this authority of the master has been exceeded and his power abused, then, it is contended, the Court *must* interfere and inquire into the circumstances, and this inquiry must arise whenever the attempt to exercise this authority unfortunately terminates in the death of either the master or slave.

If the master has no right, then, to take the life of his slave except when he *resists him by force,* or when the death takes place while the usual punishment is inflicting, it is conceived that until the occasion occurs which calls for the exercise of this extreme power—until the necessity actually exists—the master, or person representing him, has no right to resort to means or to use weapons likely to produce death, and the very moment he does so he is guilty of an abuse of his power, and if he slays the slave under these circumstances he is guilty of murder. While, on the other hand, the laws of nature and reason must permit the (153) slave, under like circumstances, to use and call into action the common instinct of self-preservation, or, at least, if he does resort to it, they will not, cannot, esteem him a *murderer* if he unfortunately slays his oppressor in obeying the impulse of nature, which is, in this instance, too strong to be repressed by any restraints which the laws of man can impose.

J. R. J. Daniel, Attorney-General. The Court is called upon to determine whether the facts set forth by the special verdict in this case be murder or manslaughter.

It will be necessary to consider the relation of master and slave in this State—the rights and dominion of the one, and the duty and submission of the other. What right and dominion, then, by the laws of North Carolina, does the master possess over the slave?

It is conceded that the master has no right to take the life of the slave under such circumstances as would indicate that malice essential to murder or a felonious intent. Subject to this restriction, I hold that his authority is absolute and uncontrolled. In establishing this position it will be necessary to consider what was the state or condition of slavery

when first introduced among us, and the regulations to which it has been since subjected.

Slavery in some sort or other has existed in many portions of the habitable globe from an early period of the world to the present day. It has been remarked "that the world, when best peopled, was not a world of freemen, but of slaves." It existed among the favored children of Israel, in Egypt, Assyria and Babylon; also in Greece and Rome. The boors of Denmark, the traals of Sweden and the serfs of Russia have presented specimens of slavery in those countries, respectively. The villains of England were in many respects in the condition of slaves. In some countries it has existed in the most absolute and despotic form. Such is the state of slavery in Africa.

In 1620 a Dutch ship, availing herself of that freedom of commerce then but just extended to the colony of Virginia, brought to Jamestown and sold as slaves twenty Afri-
(154) cans. In 1624 the government of the colony devolved upon the King (James I.), who, it is said, as well as Queen Elizabeth before, and Charles I. and II. and William III., afterwards, encouraged the African slave trade by chartering companies to carry it on, while the governors of the colonies were forbidden to sanction any law against the introduction of slavery. Thus slavery was first introduced into this country and, as I apprehend, the legal foundation laid of our right to slave property.

From the origin of slavery it was probably absolute when first introduced. The slave-trader acquired from the slaveholder in Africa that absolute authority and dominion which he possessed, and transferred the same to the colonial purchaser.

But if the opinion of *Taylor, J.*, in the case of *State v. Boon*, 1 N. C., 191, and of *Taylor* and *Henderson* in the case of *State v. Reed*, 9 N. C., 454, be correct, absolute slavery has never existed in this State—indeed, could not. In the case of *State v. Boon, Taylor J.*, used the following language: "I cannot yield my assent to the proposition that a new felony is created by the Act of 1791, or that any offense is created which did not antecedently exist; for the killing of a slave, if attended with those circumstances which constitute murder, amounts to that crime, in my judgment, as

much as the killing of a freeman. What is the definition of murder? The unlawful killing of a reasonable being, within the peace of the State, with malice aforethought." The reasoning in the case of *State v. Reed* is substantially the same.

I must here remark that the definition of murder relied upon by the learned Judge to sustain his position is taken from the laws of a country where slavery, as with us, is unknown, and where, it is said, it cannot exist. The reasonable being within the peace, to whom it was intended to apply, was a subject of the King. There were no others to whom it could apply. It has been made to apply, it is true, to the killing of a villain, as well by his lord as by another; but a villain was regarded as a subject of the crown; and, though the lord had an interest in his services, (155) yet for many purposes he was a freeman.

Although the law, in its present advanced state of humanity and religion, has thrown the mantle of its protection around the life of the slave, as well against the wanton and unprovoked cruelty of the master as of the stranger, with additional protection against the latter, yet he is regarded as property—may be the subject of traffic, will pass under the description *goods and chattels,* and is liable to be sold by virtue of an execution against the master. Is it improbable, then, that a slave acquired by transfer from him who it cannot be doubted was possessed of absolute authority, and at a time when the African slave trade was stimulating the cupidity of the nations of Europe, was regarded in the light of property rather than as a human being entitled to the benefit and protection of the law?

If it be insisted that our courts of justice are bound to apply the principles of the common law to the killing of a slave by his master, independent of any legislative enactment, is there any reason why they should not be applied to him as a human being, under the protection of the law, in a question of property? But to insist upon such an application of the principles of the common law would be to annihilate all right to this species of property; for, although it was adjudged in the fifth year of William and Mary that trover would lie at common law for a negro boy, yet in the case of *Chamberlain v. Harvey,* Ld. Raym., 47, and *Smith v. Gould, Ib.,* 1274, and Salk., 666, it was determined it would not, on

the ground that one could not have such property in a negro as to maintain this action.

It is true that absolute slavery is inconsistent with the moral law; and if it were impossible for municipal regulations authoritatively to enjoin or tolerate anything not sanctioned by the principles of morality, that would be a conclusive argument against its introduction. It is desirable, however, that the laws of political societies should, as far as can be, conform to the moral law, but some must, in the nature of things, rest for their justification, or excuse, in principles of policy. Many municipal regulations are arbitrary (156) in reference to the natural or moral law, and adopted with a view to the great ends for which civil government was instituted. Writers differ as to the foundation of the right of property, to the extent to which it is allowed in civilized communities, even in relation to inanimate objects; some referring it to the law of nature, others to the law of society.

In the case of *State v. Boon*, 1 N. C., 191, the contrary opinion to that of *Taylor, J.*, is maintained with great ability and force of argument by *Judge Hall*, a man conspicuous for his humanity and the benevolence of his disposition.

The position that slavery, as at first introduced among us, was absolute, derives additional strength from the legislation of the country. In 1774 the Legislature passed an act for the purpose of removing the doubts then entertained as to the punishment proper to be inflicted for wilfully and maliciously killing slaves, and prescribes for the first offense of the kind twelve months' imprisonment, and for the second death, as in case of murder. Iredell's Rev., 1715 to 1789, p. 274. *Judge Hall*, in his opinion in the case of *State v. Boon*, remarked: "What the powers of a master were over his slave prior to the year 1774 have not been defined. I have not heard that any convictions and capital punishments took place before that period for the killing of negroes." In 1741 an act was passed making it death for slaves conspiring to rebel, or make insurrection, or murder any person, and providing a court of three justices and four freeholders to try such offenses in a summary way and without the intervention of a jury; and in section 55 of the same act it is provided that nothing therein contained shall be construed,

deemed or taken to defeat or bar the action of any person or persons whose slave or slaves shall be killed by any other person whatever, contrary to the true intent and meaning of this act. *Ib.*, 94 and 95. From the provision of the above acts of Assembly it appears that a wide distinction was recognized between the life of a white man and slave previous to the year 1774, and that an action could be maintained previous to the year 1741 by the owner against a person for killing his slave; for the object of section 55 was to guard against such a construction of a previous section (157) as would bar or take away the action for damages which previously existed. Now, when it is recollected that, according to the common law of England, when a felony is committed the civil remedy is merged in the felony and never otherwise settled in this State until within a few years, in the case of *White v. Fort,* 10 N. C., 251, the inference is strong, if not irresistible, that the killing of a slave was not felony until it was made so for the second offense by the Act of 1774. It is also remarkable that the Act of 1774 takes care to recognize and enforce the civil remedy for damages for the first killing only, and not for the second. Why not for killing the second slave as well as for the first? The injury to his owner was as great as to the owner of the first. It must have been, because the second killing was made felony, and the civil remedy was merged in the felony, according to the principles of the common law, which, in this respect, the Legislature did not think proper to alter.

The Act of 1791 (Rev., ch. 335, sec. 3) complains of the Act of 1774 as being disgraceful to humanity and enacts "That if any person shall hereafter be guilty of wilfully and maliciously killing a slave, such offender shall, upon the first conviction thereof, be adjudged guilty of murder and shall suffer the same punishment as if he had killed a freeman: *Provided always,* that this act shall not extend to any person killing a slave outlawed by virtue of any act of Assembly of this State, or of any slave in the act of resistance to his lawful owner or master, or to any slave dying under moderate correction." It was the intention of the Legislature, in passing this act, to punish the malicious killing of a slave with death; but such was its phraseology that when the principles of the criminal law were applied to it, it failed of its object.

The act speaks of the *wilful and malicious killing* of a slave, and did not therefore embrace a case of manslaughter, that offense not being attended with malice. *State v. Piver,* 3 N. C., 79; *State v. Tackett,* 8 N. C., 210. And when the killing was wilful and malicious, by prescribing such punishment as was inflicted for killing a freeman, such
(158) doubts arose as would not warrant the punishment of death; for the killing of a freeman might be either murder or manslaughter, being attended with different punishments. Besides, when a new felony is created, the benefit of clergy is incident, unless it be expressly taken away. The proviso contained in the act excepts, among other cases, that of the lawful owner or master killing his slave in the act of resistance. Now this proviso, upon principles of sound construction, confers no new power or authority upon the master, but is a legislative recognition and reservation of a portion of that which he before possessed over his slave, affording another strong proof that the killing of a slave was not then regarded as felony at common law; for upon principles of the common law the killing of a slave in the act of resistance might be felony.

In the year 1801 (Rev., ch. 585) the Legislature passed another act, more guarded in its phraseology and certain in its import, whereby the offense of murdering a slave is expressly ousted of clergy. This act, however, still left unprovided for, as before, the killing of a slave under such circumstances as amounted to manslaughter. In 1817 (Rev., ch. 949) the Legislature passed an act supplying the omission. That act declares that "the offense of killing a slave shall hereafter be denominated and considered homicide, and shall partake of the same degree of guilt when accompanied with the like circumstances that homicide now does at common law." This act, it is conceived, embraces all the protection which the laws of North Carolina afford to a slave against his owner or master. In regard to strangers it is otherwise. There the principles of law may and do combine with the principles of humanity, and of policy, to afford him other and further protection. *State v. Hall,* 9 N. C., 582.

From the several acts of the Legislature referred to, the inference is strong, if not conclusive, that the killing of a slave was not felony in this State until it was declared so to

be by the Acts of 1774 and 1791; for if it was so regarded before the Act of 1774, the object of the Act of 1791 could have been better accomplished by the simple repeal of that of 1774; nor would there have been any necessity (159) for the Act of 1817.

If the killing of a slave was felony in this State before the Acts of 1774 and 1791, how did the Court come to the conclusion, in the case of *State v. Boon,* that no judgment could be pronounced, and in the case of *State v. Piver* that the defendant could not be convicted of the offense of manslaughter for killing a slave?

If the view which I have presented be correct, the authority of the master is uncontrolled, except by the Act of 1817. This proposition, in reference to the slave, is, I admit, a harsh one, and it is far from being grateful to my feelings to maintain it; but I am feebly endeavoring to ascertain, from the best lights in my reach, what the law is in a highly delicate and important matter, involving extensively the best interests of society, and must indulge a freedom of inquiry becoming the occasion. The position contended for is, however, in strict accordance with the case of *State v. Mann,* 13 N. C., 264.

If such be the extent of the authority and dominion of the master over the slave, the duty and submission of the latter must be co-extensive; for if the law confers rights on the master it will enjoin submission to those rights as a duty on the part of the slave. It is no part of my proposition, nor was it any part of that of the Court in the case of *State v. Mann,* that the master has absolute and uncontrolled authority over the life of the slave. It is distinctly conceded by me, and, as I conceive, by the Court in the above case (for the protection of the statute law is expressly adverted to), that the life of the slave is protected against the wanton and unprovoked cruelty of the master, as well as the stranger, or against such killing as upon principles of the common law would amount to murder or manslaughter.

Assuming for the present that the deceased was the master of the slave, Will, let us inquire whether the facts set forth in the special verdict constitute murder or manslaughter.

If it be true that the authority and dominion of the master over the slave, except so far as to protect his life from

(160) such destruction as would amount to murder, or manslaughter, it will follow that the killing under the circumstances set forth in the special verdict will be murder. It is a well-settled principle of criminal law, that every homicide is deemed to be murder, unless circumstances are shown, which will extenuate it to manslaughter, excuse or justify it. It is not contended on the part of the prisoner, that this is a case of excusable or justifiable homicide; but it is insisted, that it is manslaughter only. Now to extenuate a homicide to manslaughter, there must be a *legal provocation*. It is insisted that the shooting, and subsequent pursuit and seizure, by the deceased, amounted to such provocation. I deny the position. What is sufficient or legal provocation? It must be such as is calculated to excite the passions to such a pitch as to destroy the free exercise of reason, so that the act of killing can be fairly ascribed to passion, and not to the malignity of the heart. I contend, however, that nothing which the law recognizes and tolerates as a right, can amount to such provocation. It must be what the law forbids either as an offense or civil injury. No matter how repugnant to the principles of the moral law, or the precepts of Christianity, may be a right which the municipal law recognizes, yet those towards whom its exercise is permitted, must submit to it. It must be so, or the law would be inconsistent with itself; it would deny the enjoyment of a right, at the same time that it authorizes its exercise. If the master's authority be what I contend it is, and the case of the *State v. Mann* has any foundation in law, the conduct of the deceased towards the prisoner, was in nowise forbidden by law, and could not, therefore, constitute a *legal provocation*, to extenuate the homicide to manslaughter. One of the cases put by one of the counsel for the prisoner, affords an apt illustration of the position here contended for. He says, "If an apprentice being under a lawful correction, shall resist and slay his master, it is murder and not manslaughter, because the law cannot admit that he was provoked."

I do not insist that the slave is bound to submit to every attempt of violence on the part of the master. It has (161) already been conceded that the life of the slave is under the protection of the law. If, therefore, the master attempt to take the life of the slave in a wanton or cruel,

unjustifiable or inexcusable manner, the slave may resist the attempt, even unto death, upon the principle of self-defense. For as the law protects the life of the slave, it will permit the use of his faculties to prevent unlawful destruction, no matter by whom assailed. If the necessity to slay the assailant, being his master, in order to protect his own life, has ceased, and he kills without such necessity, it will be murder. For if the act be committed under the influence of passion, roused by the exercise of a right recognized by law, it cannot be referred to as a *sufficient or legal provocation,* so as to extenuate it from murder to manslaughter, any more than the act of the apprentice slaying his master while under a lawful correction.

These positions flow from the principles of law upon which the decision in the case of the *State v. Mann, supra,* are based, and are in strict conformity with that protection designed to be extended to the slave, and the authority and dominion of the master. To make this case, or any other where a slave kills his master, or owner, manslaughter, would add nothing to the security of the slave, for the idea of protection or self-preservation does not enter into the offense of manslaughter; it proceeds from passion.

But it may be supposed that if some indulgence is not extended to the passions of the slave, an impossibility will be required of him—that to which human nature cannot submit. In judging of the capability of the slave to submit to correction, or the exercise of authority, even under circumstances of violence and indignity, we must not make ourselves the standard. If so, we should regard that privation of natural freedom, which belongs to a state of slavery, at least as a sufficient provocation to extenuate a homicide to manslaughter; for to a freeman the idea of slavery is more intolerable than that of death. But in general, one who is born and nurtured in slavery is contented with his condition; and instances not rare, where slavery is preferred to freedom. When under the punishment of the master, we seldom discover more than the writhings of bodily (162) pain, and passive submission. The truth is, the slave being taught to believe that he is the property of his master, and that submission to his will is commendable, feels no degradation or sentiment of indignity common to the breast

of a white man, under the severest chastisement. He knows that such belongs to his lot or condition. To withhold from a slave, therefore, who has slain his master, that extenuation due to the passions of a white man, would not be too much for human nature inured to slavery, to submit to; and while it would detract nothing from the security of the slave, it would add to that of the master. The principle of self-interest in the master, humane and moral considerations, public opinion, the punishment which the law inflicts for the felonious or malicious killing of a slave, would impose restraints for his protection, while the master would be secured against the passions of the slave.

But if our Courts of justice should assume the front rank in the humane and benevolent work of advancing the slave in the scale of moral beings, instead of leaving that task to the Legislature, by declaring that what in the case of the *State v. Mann*, was held to be not even an assault in law, shall, when made the pretext by a slave to kill his master, extenuate the killing to manslaughter, it behooves us to pause and reflect upon the probable consequences. If, instead of knowing that the authority of his master is unlimited, except by those restraints for the protection of his life, he is given to understand that it is abridged still further, and that for violence inflicted by the master, with any weapon calculated to produce death, be it a gun, rod, or cane, he may wreak his vengeance without incurring the punishment of death, what will be its tendency? It will increase the importance of the slave, and beget a spirit of insubordination, the most dangerous to the peace and safety of the community. Begin the humane work of advancing them in the scale of moral beings, and it may be discovered, when too late, that such policy must result in the destruction of the rest of society, or of the slave population. They would become discontented; one
(163) privilege or indulgence would beget desires for another, until nothing short of absolute emancipation would satisfy. It must then be had, or an alternative the most shocking to humanity would then be resorted to.

I have supposed the deceased, who was an overseer, to stand in the relation of master to the prisoner. That is the light in which he must be considered. It is competent for the owner of the slave to delegate that authority and domin-

ion to another, which he himself possesses—the slave has no will in the matter. According to the understanding of the country, the employment of an overseer is an investment by the owner of that authority which he possesses, with a view to the accomplishment of the object of his employment. The overseer is regarded as the master, in the absence of the owner, for all purposes of authority and obedience. In the case of the *State v. Mann* it was held that the hirer is clothed with the authority of master, for the term of hiring, in order to the enjoyment of that interest which he has in the services of the slave. There is the same necessity for such authority in the overseer, to secure the services of the slave to the master.

GASTON, J., after stating the case, proceeded: This question has been argued with great ability and zeal. It has been considered by us with all that solicitude which its grave character and the important interests which it involves so imperatively demanded, and it now remains for us to pronounce the result to which our deliberations have conducted us.

The crime charged is that of murder at common law. By that law murder is described to be "when a person of sound mind and discretion killeth any reasonable creature in being, with malice aforethought"; and the inquiry in this case is whether upon the facts found the law adjudges that the killing was committed with malice aforethought. If it so adjudge, then the prisoner was rightfully convicted of murder; if it do not so adjudge, then he was guilty of that felonious and unlawful homicide which it terms manslaughter. This term, malice aforethought, is not restricted to the case of direct malevolence to the unfortunate victim of violence, but is extended to all those cases where the (164) fatal act is not the result of a sudden transport of passion, which may be regarded as incident to human infirmity, but is characterized by wickedness, and manifests a depraved heart, regardless of the rights of others, and fatally bent on mischief. Where there is no explanation of the motive, the law can attribute the deed only to this wicked disposition, as it will not presume the existence of what does not appear. But where the facts connected with the transaction show a motive—an immediate cause for the act done—the law as-

signs the deed to that motive, the effect to its immediate cause, and will not lightly admit that it was the consequence of any preconceived purpose.

The prisoner is a slave, and, at the time of this transaction, was under subjection to the deceased, who was an overseer, employed by the master of the prisoner for superintending the management of his plantation. A complaint of some act of petulance and impropriety having been made to the deceased against the prisoner, the deceased formed a resolution of punishment or violence, the precise nature of which does not appear. From his positive reply to his wife's dissuasion; from his directing the foreman to follow with a cowhide, and from his taking a gun with him, it must be inferred that his primary intent was to inflict corporal chastisement on the prisoner, and that he also purposed, in some event which he deemed not unlikely to occur, to shoot the prisoner. Upon arriving within twenty or twenty-five feet, he called to the prisoner, who was engaged at his labor, and who immediately approached the deceased in a respectful manner, near enough to hear a communication of his purpose. The prisoner, on learning it, made off, and when distant between ten and fifteen steps, the deceased fired upon him, lodged the whole load in the prisoner's back, and inflicted a wound likely to occasion death. The prisoner fled, was headed by the deceased, turned to fly in an opposite direction, was overtaken by the deceased, and by several negroes, who had been ordered in pursuit, struggled to avoid the arrest, used his knife to cut himself free, and in the struggle inflicted with the knife two wounds, one on the thigh, the other on the arm, the lat-
(165) ter of which proved mortal. The whole transaction, from the time of the shooting until the fatal struggle, did not last more than six or eight minutes.

Had this unfortunate affair occurred between two freemen, whatever might have been their relative condition, the homicide could not have been more than manslaughter. Take the case of a master and apprentice, where the latter flies to avoid correction which the master has a right to inflict. If the master were to shoot at him, engage in hot pursuit, overtake him, and in the immediate struggle the master was killed, the deed could not be attributed to downright wickedness, but to passion suddenly and violently excited, to that

"fervor brevis" which leaves not to the mind the calm exercise of its faculties, and which the law must regard, not indeed as excusing the act, but as extenuating the degree of guilt. If an officer, armed with the authority of the law to arrest one who has committed a misdemeanor, were, upon the culprit's flying to avoid an arrest, to use his authority with the same circumstances of outrage, and the like result had happened, the crime would not be murder, but manslaughter only. (1 Hawkins, ch. 13, secs. 63, 64, 65; Foster, ch. 2, sec. 2; 1 East Homicide, secs. 70-86). It must be admitted, however, that the relation which exists between the owner or temporary master, and his slave, is in many respects strikingly dissimilar from that which the law recognizes between a master and his apprentice, or between any two freemen of whom one may have the right to arrest, imprison, or even chastise the other. Unconditional submission is the *general* duty of the slave; unlimited power is, in general, the *legal* right of the master. Unquestionably there are exceptions to this rule. It is certain that the master has not the right to slay his slave, and I hold it to be equally certain that the slave has a right to defend himself against the unlawful attempt of his master to deprive him of life. There may be other exceptions, but in a matter so full of difficulties, where reason and humanity plead with almost irresistible force on one side, and a necessary policy, rigorous indeed, but inseparable from slavery, urges on the other, I fear to err should I undertake to define them. The general rule is that which has been before declared. There is no *legal* limitation (166) to the master's power of *punishment,* except that it shall not reach the life of his offending slave. It is for the Legislature to remove this reproach from amongst us if, consistently with the public safety, it can be removed. We must administer the law, such as it is, confided to our keeping.

It is not necessary on this occasion to determine (and we would avoid all unnecessary inquiries) whether the power of an overseer is as unrestricted as that of the master. All of us agree that in the case before us he had an unquestionable right to judge of the offense which had been committed by the prisoner, and to inflict such chastisement as, according to the usages of discipline and his sound discretion, was proper to enforce subordination. Upon the special verdict we see no

fact from which it can legally be inferred that his primary purpose was to do more. He was acting, then, within the limits of his rightful authority when he summoned the prisoner to him and announced his resolution; and the act of the prisoner in attempting to evade punishment was a breach of duty. This act, however, was not *resistance* nor *rebellion,* and it certainly afforded no justification nor excuse for the barbarous act which followed. Had the prisoner died of the wound which the overseer inflicted, the latter would have been guilty of manslaughter at least—probably of murder. The offense of shrinking from menaced punishment called for no such desperate corrective; the deed was the more strongly impressed with the character of cruelty, as it was preceded by no warning to the fugitive, and it was too probable that it had been deliberately contemplated and eventually resolved on before the attempt to escape. Had the prisoner, previously to the shooting, resisted an arrest, and, in the course of the struggle, inflicted the mortal wound on the deceased, there is no doubt that his crime in legal contemplation must have been murder. Nothing had then occurred which could have excited in any but a cruel and wicked heart—in a heart fatally resolved on illegal resistance, at whatever risk of death or great bodily harm to others—a passion so violent and so destructive in its consequences.
(167) It is not to passion, as such, that the law is benignant, but to passion springing from human infirmity. But after the gun was fired, all must see that a vast change was effected in the situation of the prisoner; and that new and strong impulses to action must have been impressed upon his mind. Suffering under the torture of a wound likely to terminate in death, and inflicted by a person having, indeed, authority over him, but wielding power with the extravagance and madness of fury; chased in hot pursuit; baited and hemmed in like a crippled beast of prey that cannot run far; it became instinct, almost uncontrollable instinct, to fly; it was human infirmity to struggle; it was terror or resentment, the strongest of human passions, or both combined, which gave to the struggle its fatal results; and this terror, this resentment, could not but have been excited in any one who had the ordinary feelings and frailties of human nature. But will the law permit human infirmity to extenuate a homi-

cide from murder to manslaughter, in any case where the slayer is a slave, and the slain is the representative of his master? Will it allow in such a case *any* passions, however common to human beings, and however strongly provoked into action, to repel the allegation of malice?

In considering these questions it may not be unimportant to remember that *passion*, however excited, is not set up as a legal defense or excuse for a criminal act. To kill a man in a sudden fury is as much *a crime* as to slay him because of personal malevolence, or of a general hostility to the human family. No one has a *right* to yield to passion the dominion over judgment and conscience, and an illegal act of violence becomes in no respect lawful by being committed during a voluntary overthrow of reason. But the law in its salutary chastisement of vicious and imperfect beings, endeavors to temper rigor with benignity, and visits with greater or less severity a violation of its injunctions, accordingly as it traces such violation to more or less atrocious motives, indicating more or less human depravity or human frailty. The prisoner's traverse extends to the whole charge contained in the indictment, and his right to impel the averment of malice is but a right to be *tried* before he is *convicted.* (168) If the entire charge be sustained, he is then guilty, as charged; if the allegation of *malice* be not sustained, he is guilty only of the residue of the matter charged.

The law, which holds that passion springing from ordinary frailty is not malice, has also undertaken to designate what provocation or excitement may or may not rouse passions in minds infirm, although not malignant. This undertaking to give greater precision to its rules, so far as it has been successful, has been effected by the labors of wise and good men, continued through a long series of ages, and is evidenced by adjudications in the numerous, or rather innumerable, cases of homicide which the annals of human crime present. The secondary rules thus ascertained and authoritatively enforced are as obligatory upon the conscience of Judges as the primary rule itself. They explain the primary rule, limit its extent, show its application, and restrain the exercise of a vague discretion. Some causes of passionate excitement are termed "*legal* provocations," while others have been declared not to be "*legal* provocations." This term

must not be understood to mean that a man has a legal right to be provoked, but only that the *law* regards certain offensive acts as provocations, while it refuses to consider others as such. The latter, though provocations in common parlance, are not provocations in a legal sense, and therefore not comprehended in the phrase of "legal provocations." When a case of homicide happens in which the *fact* of provocation occurs, and the legal character of that fact has been settled by precedents, the judicial duty is comparatively plain. But where the legal character of the fact has never before been settled, it then becomes one of vast responsibility, and often of no little difficulty. The *principle* to be extracted from former adjudications must then be diligently sought for and prudently applied. In most of the cases where passion has been viewed as mitigated by infirmity, it has been called into action by injuries which the law punishes as crimes against the community. A man is assaulted, and in a transport of passion kills the assailant; or an individual who has committed an offense short of felony, is arrested or at-
(169) tempted to be arrested by an officer without a lawful warrant, or with unlawful violence, and in the struggle kills the officer, the injuries of the deceased, which the law regards as provocations, are misdemeanors, and as such the subjects of criminal prosecution. Is it the criterion which discriminates ordinary from malignant passion, that the former is excited by offensive conduct amounting to a breach of the public law? If it be, then can the prisoner's guilt be alleviated into manslaughter? The overseer had indeed inflicted a wound which *might* have proved mortal, but it did not terminate in death. Had the overseer lived he could not have been indicted for the deed; for, however criminal his intent, the criminal act was not consummated. If he could not have been indicted for the act, can this act be termed a legal provocation?

On deliberate reflection, the Court is satisfied that this is not the criterion. The law does not regard certain acts as provocations because they are indictable, but in many cases it makes certain acts indictable because they are provacations, and may occasion the shedding of human blood. There are legal provocations for which an indictment will not lie. There are indictable injuries which are not legal provoca-

tions. A libel is not only a civil injury, but a public offense, yet the law will not consider it a provocation extenuating the slaying of the libeler into manslaughter, although the deed may have been committed in the *first* gust of passion. Adultery is not an indictable offense, yet of all the provocations which can excite man to madness, the law recognizes it as the highest and the strongest.

If the law were, from a policy well or ill conceived, to make it an indictable offense to call a man a liar, the rule would yet remain "that words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder." If, on the contrary, it should declare no assaults indictable which did not cause actual bodily harm, to spit in another's face would remain, as it is, a provocation. Consistently with good sense, can this be the criterion? The circumstance that adequate punishment will be inflicted by law ought rather to make the (170) sufferer more patient under wrong, while the belief or the knowledge that human laws afford no redress is calculated rather to exasperate resentment, to augment terror, and to perplex and distract reason. The application of such a criterion to cases like the present would lead to extraordinary results. The inquiry is, with what *disposition* was the fatal act done? That disposition must depend on the then exciting causes. Events subsequently happening, and which it was not given to man sagacity to foresee, *certainly* did not and *could* not operate either to increase or lessen excitement. yet, accordingly as this unknown contingency shall eventuate, the law—proudly styled the perfection of reason—determines on the disposition with which a preceding act was done! If the wound, apparently mortal proves mortal, and the negro dies, then he killed the overseer in a moment of human infirmity; for the act of the deceased which led to it was an indictable offense. But if it please the Author and Preserver of life to raise him from the bed of death, then his act was not prompted by passion, but instigated by malice. If he lives, he is a murderer; but if he die, he was not. Often the law, in its mercy, withholds from a criminal act which, because of some happy casualty wholly independent of the will of the wrongdoer, has not been completed, the full rigor of its punishment; but if, in our code of criminal law, there be any

case in which an unlawful intent is by a subsequent casualty *aggravated* into a *purpose* of deeper atrocity, it has escaped our observation.

What, then, is the true *principle* which characterizes the various adjudications on the subject of provocation and excited passion? I am compelled to say that no other is to be found but what is contained in the primary rule itself, applied from time to time by wisdom and experience to cases as they occurred, until, in a vast majority of the cases that can occur, the existing tribunals of justice find a safe guide in the undisputed decisions of their predecessors. Where they have not this guide, they are bound to act as those acted who had no precedent to direct them. We have no ad-
(171) judged case that determines this question, or presents us with a precise rule by which to determine it. The case of the *State v. Mann,* 13 N. C., 263, does not bear upon the question. It decides, indeed, that the master or temporary owner is not indictable for a cruel and unreasonable battery of his slave. None could feel more strongly the harshness of the proposition than those who found themselves obliged to declare it a proposition of law. Not that they for one moment admitted that cruelty was rightful, but they found no law by which to ascertain what was cruelty in the master, so as to render it punishable as a public offense. Resistance, therefore, on the part of the slave to the battery of his master cannot be legally excused, although such battery may be unreasonable; but the degree of its criminality that decision cannot aid us to ascertain. The case of the *State v. Mann* at the same time pronounced, what was indeed beyond question, that the law protects the life of the slave against the violence of his master, and that the homicide of a slave, like that of a freeman, is murder or manslaughter. An attempt to take a slave's life is, then, an attempt to commit a grievous crime, and may rightfully be resisted. But what emotions of terror or resentment may, without the imputation of fiend-like malignity, be excited in a poor slave by cruelty from his master that does not immediately menace death, that case neither determines nor professes to determine. In the absence, then, of all precedents directly in point or strikingly analogous, the question recurs: if the passions of the slave be excited into unlawful violence by the inhumanity of

his master or temporary owner, or one clothed with the master's authority, is it a *conclusion of law* that such passions must spring from diabolical malice? Unless I see my way clear as a sunbeam, I cannot believe that this is the law of a civilized people and of a Christian land. I will not presume an arbitrary and inflexible rule so sanguinary in its character and so repugnant to the spirit of those holy statutes which "rejoice the heart, enlighten the eyes, and are true and righteous altogether." If the Legislature should ever prescribe such a law—a supposition which can scarcely be made without disrespect, it will be for those who (172) then sit in the judgment seat to administer it. But the appeal here is to the common law, which declares passion, not transcending all reasonable limits, to be distinct from malice. The prisoner is a human being, degraded indeed by slavery, but yet having "organs, dimensions, senses, affections, passions," like our own. The unfortunate man slain was for the time, indeed, his master, yet this dominion was not like that of a sovereign who can do no wrong. Express malice is not found by the jury. From the facts, I am satisfied, as a man, that in truth malice did not exist, and I see no law which compels me, as a Judge, to infer malice contrary to the truth. Unless there be malice, express or implied, the slaying is a felonious homicide, but it is not murder.

PER CURIAM. Judgment upon the special verdict, that the prisoner is *not* guilty of the *murder,* wherewith he stands charged, but is guilty of the *felonious slaying and killing Richard Baxter.*

Cited: S. v. Hoover, 20 N. C., 503; *S. v. Cesar,* 31 N. C., 402, 408; *S. v. Robbins,* 48 N. C., 256; *S. v. Broadnax,* 61 N. C., 44; *S. v. Belk,* 76 N. C., 12; *Hilliard v. Outlaw,* 92 N. C., 268.

MEMORANDUM.

At the last session of the General Assembly, JOHN J. R. DANIEL, Esq., of Halifax, was elected Attorney-General, *vice* R. M. SAUNDERS, Esq., who resigned.

JUNE TERM, 1835.

HARDY L. JONES v. JOSEPH PHYSIOC et al.

1. Under the Acts of 1790 (Rev., ch. 326) and 1798 (Rev., ch. 504, sec. 3), persons who appear in court and act as parties defendants, may, in case the petitioner succeeds, be adjudged to pay costs, though they have not regularly made themselves parties by a rule of court.

2. If the petitioner under these acts procures subpœnas and copies of his petition to be served on the persons to be notified, it must be at his own costs, as they are not required to be made parties by the petitioner.

PETITION filed in the County Court of CRAVEN, under the Act of 1790 (Rev., ch. 326), to correct an error in a patent. In the petition, copies and subpœnas were prayed to be served on the defendants, and they were issued and served accordingly. At the term when the copies and subpœnas were returned the defendants appeared, and had "time to answer or plead"; and the Court ordered a survey to be made of the premises in dispute, and that each party might choose his own surveyor. At a subsequent term the case was "continued by the defendants." Afterwards, upon the hearing of the cause, the Court declared that the alleged error did exist, and ordered the fact to be certified to the Secretary of State, and adjudged that the defendants should pay all the costs
(174) of the proceeding. The defendants then moved the Court to be discharged from the costs, which being refused, they appealed to the Superior Court, where his Honor, *Judge Daniel*, at the Fall Term of 1832, reversed the judgment, and the plaintiff appealed.

RUFFIN, C. J. This petition is given by the Act of 1790 (Rev., ch. 326), and the question brought here turns upon the construction of that act, and the subsequent one of 1798 Rev., ch. 504, sec. 3). The latter enacts that where any person shall make himself a party to prevent the prayer of the petition being granted, the party cast shall be adjudged to pay costs as in other civil suits, and that all the requirements of the former act, as incumbent on the petitioner before the hearing of the petition, shall be strictly observed. The County

Court gave a judgment in favor of the petitioner for his costs, which the Superior Court reversed, and the petitioner appealed to this Court. The question is, what is "making himself a party" within the act, and how is it to be done?

In the Superior Court it seems to have been thought that one did not make himself a party but by putting in a plea or answer. But no such thing seems to be within the purview of the Act of 1790, and the frame of the proceedings is not altered by the Act of 1798. The petition given is *ex-parte*. There is to be no litigation of adverse legal or equitable rights between parties. The jurisdiction is confined to the narrow point of ascertaining whether there has been a mistake in the description in the patent, and correcting it. No equity against the correction, as of a purchaser without notice, is to be alleged or heard. It is true that a kind of opportunity is tendered to the community of showing that there was no mistake, and a sort of expectation entertained that those who knew the truth would volunteer evidence of it at their own expense; for it is provided that the petitioner shall, thirty days before he prefers his petition, give notice of his intention to the owners of adjoining lands, and claimants, and that the petition shall not be heard the first term: to the end that all may be heard in opposition, and that those most likely to know the facts may have it in (175) their power to aid the discretion of the Court and uphold the public justice, if they will. It was found that such an expectation was vain, and that few would undertake the contest without at least an indemnity for their costs in case of success. This produced the Act of 1798, which neither changes the pleadings or jurisdiction further than to give costs. The petition is in its frame still *ex-parte,* and there is no matter for a plea or answer but the mistake. Upon that the law makes up the issue with the petitioner without the agency of any individual, and demands affirmative proof, which he must offer, although the parties notified were to admit it; and any person, as well as those notified, may, at any time pending the petition, contest it. There is, then, regularly, no other method of proceeding but this: that one desirous of opposing the petition should move the Court to be admitted a party, and obtain a rule for that purpose. Until that is done, no one can rightfully interfere, and the

petitioner may object to the interference of one who will not enter into an express prior rule to become liable for the costs and secure them in such way as the Court may require. But if one, without the rule being formally entered, or being required by the petitioner to be so entered, does acts in Court, which are allowed by the Court as to one opposing the prayer, and are entered of record, and which tend to delay the petitioner and to increase his costs if he fail, he thereby makes himself a party, substantially, and the Court may adjudge the costs against him as properly as if he had expressly engaged by rule to pay them. Such an actor cannot deny the acts which the record says are his acts, nor does it lie with him to deny that he did them rightfully—that is, as party—and if so, as liable for costs. Here the petitioner (though unnecessarily and therefore at his own expense) made these persons defendants by name in the petition, and had subpœnas and copies served on them. They appeared to the suit by attorney, and made motions in the cause, and took orders to render the petitioner chargeable to them for their costs.

(176) The only purpose of having any order in the cause for a survey is to make the expense of it a part of the cost. These persons took such an order at one term, and at the next procured a continuance. The Court treats them as parties thus far, and they cannot complain of being treated in the same character throughout. The judgment of the County Court against them as parties is, to another Court, tantamount to a declaration of the fact of their admission as parties, as much as if it appeared by a formal rule of that Court. For this reason, I should think, the Superior Court ought not to have reversed the judgment. But I also think that the acts of these persons appearing of record compelled the County Court to give the judgment.

The bill of costs is, however, incorrect, and to that extent the execution must be set aside. It includes the fees of the clerk for copies of the petition, and subpœnas against these defendants, and of the sheriff for serving them. This is not a proceeding between parties until the cause is constituted in court. The petitioner is at his own charges to give the notice, and a copy need not be served, except as he may choose to do so, to simplify his proof of notice. The Clerk of this Court must therefore retax the costs, and the judgment of the Supe-

rior Court be reversed, and that of the County Court affirmed, except in the particulars mentioned, with costs to the petitioner in the Superior Court and in this Court.

PER CURIAM. Judgment reversed.

Cited: Patterson v. Murray, 53 N. C., 280.

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DOE ex dem. of SUSANNAH JACKSON v. THE COMMISSIONERS OF THE TOWN OF HILLSBORO.

1. The rule that a grant cannot be presumed from one who is forbidden by law to make it, applies only where the person is forbidden under all circumstances from making it: Therefore, where the commissioners of a town were required to set apart a lot for a school, and it appeared that they had done so, yet a grant of that lot to an individual might be presumed, as the grant might have been made before the selection took place, or the first might have been given up and another selection afterwards made.

2. To establish a presumption of title from possession, it is not necessary to prove that the possession was under a claim of right, as every possession is, unexplained, taken to be on the possessor's own right.

3. If the Judge leaves it to the jury to presume a deed from length of possession and other circumstances, without stating particularly the weight which the law attaches to each circumstance as tending to establish or rebut the presumption, it is not erroneous, unless such particular instructions be prayed and refused.

4. It seems that an inhabitant of a town may be a witness for the town, where he has no distinct individual interest in the suit; and where the subject-matter of the controversy is a public charity belonging to the town, he is undoubtedly competent.

EJECTMENT, brought to recover a lot in the town of Hillsboro, known in the plan of the town as lot No. 43, tried at ORANGE, on the Spring Circuit, 1834, before his Honor, *Judge Norwood.*

The lessor of the plaintiff produced no written evidence of title, but relied entirely upon the presumption of title in her father, Thomas Brooks, arising from his long-continued possession of the premises in dispute. As to that possession, several winesses testified that Brooks lived originally in a small log house without a chimney, situated, as some of them

stated, on the common adjoining the lot in dispute, part of which at first, and the whole afterwards, he cultivated as a garden. Others of the witnesses believed that the log house was partly upon the lot and partly upon the common. The witnesses further stated that in the year 1803 or 1804 Andrew Brooks, a son of Thomas, purchased a small framed house and placed it on the lot, and, after occupying a few years, left it. Thomas Brooks remained in his log house from his first possession of it in 1780 until Andrew's removal, when he took possession of the framed house and occu-
(178) pied it until his death, in 1809 or 1810. His widow then retained possession a short time longer, when she removed to the country, leaving her son, James Brooks, in possession, who continued on the lot until 1815, when he abandoned it. Possession was then taken by one Eaton, who held until he was ejected, in 1821, by a judgment in favor of the Commissioners of Hillsboro. They leased it out until 1824, when they erected upon it a brick school-house, which has ever since been used as an academy. The lessor of the plaintiff further exhibited the list of town taxables, in which Thomas Brooks was charged with one improved lot in the years 1805 and 1807, and Elizabeth Brooks, his widow, was charged in like manner in the year 1811. The lessor of the plaintiff also called John McKerall, the Register of Orange County, who swore that during the War of the Revolution the records of that office had been buried and many of the old records obliterated thereby, though he could not state how far back his books were perfect. He also stated that there had been no accident since the Revolution by which any of the register's books had been destroyed or defaced. The death of Mrs. Brooks, the widow, and the coverture of the plaintiff's lessor from the death of her father until a short time before bringing the action, were also proved.

The defendants then produced in evidence the Private Acts of the General Assembly concerning the town of Hillsboro, from which it appeared that in 1754 four hundred acres of land were granted to William Chuston, which were by him laid off into a town and town common. In 1759 it was erected into a town called Childsburg, and commissioners incorporated. In 1766 the name was changed to Hillsboro; the lot No. 1 in the plan of the town was reserved for the use

of the public as a place for a market-house, court-house and prison, and the commissioners were directed to reserve such lots as they thought necessary on which to erect a church and school-house. In 1799 it was enacted that all and every person holding unimproved lots in the town, by entry or otherwise, shall be allowed a further time of three years to complete the necessary buildings required by law for securing titles to such lots in said town; and further, (179) that each and every person holding an unimproved lot or lots in the town, by entry or otherwise, who shall, within the term of three years, limited by this act, make such improvement on the same as shall be deemed by the trustees or commissioners of said town, or a majority of them, to be of equal value or advantage to the town as the house required by law, shall be considered as making a sufficient improvement to secure a title for each and every lot so improved. In 1786 the proceedings of all preceding commissioners are confirmed and their books are made evidence in any court of law or equity. The defendants also proved by Mr. Clancy, the clerk to the board of commissioners, whose duty it is to keep their books, and who had been called by the plaintiff, that he had often seen a book containing the journal of the early proceedings of the town of Hillsboro; that said book was lost from the records of the corporation, and after diligent search he had been unable to find it. He then stated that in that book he had often seen an entry declaring that the lot No. 43 was reserved for a school-house by order of the commissioners. The defendants also called one Horton as a witness in their behalf, but, being a citizen of the town of Hillsboro, his Honor held him to be incompetent and excluded him.

His Honor instructed the jury: "That if from the possession of Brooks, and the other circumstances in the cause, they believed that he had acquired title to the lot in dispute, they might so presume, and in that event should find a verdict for the plaintiff. If that presumption was rebutted by the evidence of the defendants, the verdict should be for them."

A verdict was found for the plaintiff, and, a new trial being refused, the defendants appealed.

RUFFIN, C. J. As no written conveyance was given in evidence by the plaintiff, the title of his lessor depends alto-

gether upon the presumption of one to her ancestor. That presumption his Honor told the jury they were at liberty to draw if they believed from the possession of Brooks (180) and the other circumstances that he had acquired title, meaning, as we take it, a deed in fee. To this instruction as at all proper, or as being so in its particular terms, several objections are taken on the part of the defendants.

The first is, that in the case proved no presumption in law or in fact of a conveyance is allowable, because the lot had been appropriated for a school by law, and the commissioners could not convey it. It certainly takes a case out of the rule of presumption if the grant to be presumed must necessarily come from a person who had no right to make it for the purposes or to the extent to which it is claimed, or if the subject of the grant cannot by law be granted: as if an easement over land be claimed under a grant presumed after his death to be made by a particular person, and that person turn out to be but tenant for life, or if one take possession and retain it for a long time, of land which a statute forbids to be entered or granted to any. In such cases a conveyance is not and cannot be presumed, because it would be presuming a wrong, and because the conveyance, if presumed, would be inoperative. It is insisted that principle applies here. We think not. The reservation of this particular lot for a school-house was a question of fact upon which the Court could give no opinion. Admit that after the reservation it could not be entered by an individual, and therefore that a conveyance to him could not be presumed, yet the Court could not assume that fact, and upon it found an instruction to the jury that here the presumption did not arise. It was among "the other circumstances" besides the possession on which the jury was to pass. If the defendants did not choose to leave its weight to the jury, they ought to have prayed the Court to instruct the jury upon the legal effect of it if they found it to be a fact that this was thus appropriated. But, admitting that to be true, it does not follow that the commissioners might not legally have conveyed it afterwards. The statute designates particular lots, as known in the plan of the town, for a court-house, prison, market and other purposes. Those, undoubtedly, the commissioners could not convey

without an enabling statute. But for a church and (181) a school the selection is left to the commissioners themselves. If they had never made one, but had conveyed all the lots to individuals, it would have been a breach of duty, yet the titles would have passed. The argument, however, is that appropriating particular parcels to those purposes is conclusive; that they could not afterwards select others nor sell the former. It seems to us otherwise. In the judgment of the commissioners, other situations yet undisposed of might be more fit, and we see nothing in the statutes to restrain their discretion upon that point, while all the grounds remained unimproved and no school was established on either. We think they might, to use a common phrase, have changed the location if the public convenience, in their opinion, would have been promoted by it. If they could, then the appropriation proved, if really made, did not prevent the doctrine of presumption from attaching to the case, in the sense in which we are now speaking, which is, whether it could be drawn, and not whether it ought. It is no answer to that, that no abandonment of this lot or selection of another is shown, because the argument depends on this proposition: that the grant under all circumstances would be void, and therefore cannot be presumed; and it is fully met when it appears that under some supposable circumstances the grant would be good. We think, therefore, that it was not on this ground erroneous to leave the case to the jury as one in which a conveyance might be presumed as a fact.

It is again objected that the instruction was defective in not stating as a part of the proposition that the possession on which the presumption arises must be founded on and be accompanied by a claim of right in the possessor, for that here there was no evidence of such claim, but evidence to the contrary.

It is true that when one enters as tenant to another, or occupies under a claim of right not inconsistent with the title of the true owner, no length of possession will authorize a presumption of a deed as an arbitrary legal inference. But there was no evidence here of an express tenancy, but simply a possession. Every possession is taken to be (182) on the possessor's own title until the contrary appears, as the possession is in itself the strongest evidence of the

claim of title, and, when long continued, of the title also. Leaving the possession to the jury as a ground of presumption left it as evidence both of the right and the claim of right, and it cannot be doubted that the jury must have understood that to authorize the presumption they must believe that Brooks occupied and used the ground *as his own.* To establish such claim did require express evidence of it, independent of the possession itself. This might certainly be rebutted by positive or circumstantial evidence that he did not thus claim it, as that he acknowledged the title of the town, or even that he merely occupied, setting up no title in himself, so that his possession was not adverse to the owner, whoever that owner might be. Perhaps there are circumstances here sufficient to justify those conclusions to a judicial mind, such as that *no* compliance by Brooks of any of the notorious prerequisites to his getting a title is shown, and therefore he had no right to a deed; and especially that during his whole occupation he does not appear to have listed the lot as private property for public or town taxes, or paid them, and it does not seem to have been assessed in any way for taxes more than two of those years, and that as recently as 1805 or 1807, and that may have been without his knowledge or concurrence. If in such a case the Court had laid down the presumption as a conclusion of law, or even *advised* the jury to presume a conveyance, or declared that it could not be inferred that Brooks did not claim the lot as his own, we should have thought it erroneous. But the Court did not lay down any such propositions. On the contrary, the case was left to the jury upon the circumstances merely as evidence to establish the fact of a title according to their belief of the real fact.

Regarding it in that point of view, the counsel further urged that the Judge was bound to explain to the jury the rules of law and reason which might be useful to them
(183) in ascertaining the weight of the circumstances tending to rebut the presumption so as to aid the jury in that duty.

We consider it within the province of a Judge to give such explanations as to the tendency of evidence, the grounds of its reception, and the inferences which may be drawn from it, not touching the credit of the witnesses, nor determining

its weight as establishing particular inferences. But it is impossible for this Court to correct omissions in the summing up by the Judge who tries a cause as to this part of his duty, unless the party shall pray particular directions and the Judge refuse to give them when proper. Whatever we may think of a verdict, this Court cannot order a new trial because it was against evidence, but only order a *venire de novo* for the error of taking a verdict without evidence. Here the case was left to the jury, upon the inquiry of fact, whether a deed was made. The long possession and building a house, and the assessment for taxes even for two years, is evidence tending to establish that fact. The question depended on its sufficiency and on the force of the circumstances tending to rebut the presumption. I do not think it proper to go over them, because it might prejudice the parties upon another trial. Whether they tended to rebut, and why they had that tendency, the defendants might have asked of the Court to say, but, not having done so, there is no power in this Court to help them. The verdict upon the facts simply is beyond our control, and the judgment would be necessarily affirmed if the case depended upon this point alone.

The counsel for the defendants makes another point upon the rejection of Horton as a witness on the ground that he was an inhabitant of the town.

It is first denied that he is a corporator, because the charters do not incorporate the town, but only the commissioners, and therefore the witness had no interest. We are inclined to the contrary opinion; for, as citizens of the place, many duties are imposed and immunities conferred on the inhabitants of chartered towns. But, whatever there may be in this, we pass it over, as our decision is made on a different ground.

Admitting him to be a corporator, it is contended (184) that he was competent because he had no private and distinct personal interest. It is clear that being merely a corporator will not disqualify a witness. There must be an individual interest in him, and the charter may be looked through to see if the persons composing the corporation have such an interest. But, upon examining the decided cases, it cannot be said to be a settled point in law that an interest in the constituted authorities of a place for the benefit and public uses of the whole place is or is not such a

degree of interest in each corporator as will exclude him. Thus, upon a question whether a bond belonged to a corporation, the objection was allowed that the corporators could not be witnesses. 1 Vern., 254. In *Burton v. Hinde,* 5 T. R., 174, it was held that a freeman could not prove the title of the corporation to a rent which was reserved to the use of the whole corporation. On the other hand, in *Rex v. Mayor of London,* 2 Lev., 230, Shaw, 146, upon a *quo warranto* for taking a toll upon sea coals, the defendants prescribed for the duty and called freemen to support the title, and they were received because the advantage was to the city and not to the witnesses in particular, and so remote an interest could not produce a bias. In New York it is decided that an inhabitant of a town who pays taxes to support the poor is a competent witness for the overseers of that town against those of another relative to the settlement of a pauper and for a penalty incurred by improperly removing him. *Falls v. Belknap,* 1 John., 386; *Bloodgood v. Overseers of Jamaica,* 12 John., 285. And these cases agree with that of *Rex v. Netherthong,* 1 Maule & Selw., 337. In this State the citizens of a county are constantly received as witnesses upon indictments, although the fines imposed belong to their county, and it is liable for the costs if the prosecution fail; and also in suits for county money between the county and its officers. It is so from necessity. In many of the charter acts the authorities are authorized to impose penalties which are made recoverable before the magistrate of police or other officer, and the town constable may give information and prove the offense. With rules and decisions thus inconsistent,

(185) the only resource of the Court would be to refer to principles and convenience for guides. Consulting them, it would seem to us that an interest in the whole community for the common weal only is not a particular private interest which makes the verdict of advantage or disadvantage to each citizen; or, if it be, that it is so minute and remote that the argument of slight bias from it is repelled by the frequent necessity of using such witnesses or having none.

But in this particular case even that objection does not apply, because the property here is not for the use of the corporation as a thing of value and yielding a revenue for the general purposes of the town. This lot is claimed for a

school-house, or set apart for that purpose, under the Act of 1766, on their books, which are made evidence by the Act of 1786. It may be leased, but the profits are applicable only to the school. It is therefore a foundation of public charity, in which no individual, wherever resident, has an exclusive and particular interest. If the action were on the demise of the commissioners in their corporate character, the persons composing that body would be, respectively, competent witnesses for either side, as the trustees of the University have often been. They are merely trustees of the charity, and the body politic is the real party, as was held by *Lord Kenyon* in *Weller v. Foundling Hospital,* Peake N. P. Cases, 206, and seems never to have been since doubted. Such must be the nature of school property of public and not private institution and endowment. Upon this as a distinct principle the opinion of the Court is that the witness ought to have been received, and therefore there must be a *venire de novo.*

PER CURIAM. Judgment reversed.

Cited: Washington v. Frank, 46 N. C., 439; *Ruffin v. Overby,* 88 N. C., 372; *Aycock v. Railroad,* 89 N. C., 324; *Bryan v. Spivey,* 109 N. C., 69.

(186)

MARGARET E. HARVEY et al. v. MARY SMITH et al.

1. When, upon a petition in the County Court for repropounding an alleged will for probate, the Court ordered the same to be repropounded, and directed an issue, from the finding on which the petitioners appealed to the Superior Court; it was *held*, that the appeal carried up the whole case, and that the Superior Court had power to revise the order for repropounding the will, although the defendants had not appealed from that order.

2. A paper-writing, alleged to be the will of a married woman, devising real estate, made under a power in a settlement, can only be supported in equity as an appointment, and cannot be propounded for probate as a will in a court of law; and all proceedings for that purpose are erroneous.

3. Where a petition for repropounding a will for probate does not state between whom the issue, on the first attempt to prove it, was joined, nor show whether the proper persons were parties to that issue, nor whether the executor acted *bona fide* or otherwise, so that the Court cannot see whether the petitioners were or were not bound by the finding on that issue, the petition will be dismissed as uncertain, informal, and defective, but without prejudice to the right of the petitioners to propound the same again, in a proper form before a competent tribunal.

PETITION to have an alleged will repropounded for probate.

Margaret and Mary Harvey, infants, by their next friend, at May Term, 1833, of Perquimans County Court, filed their petition, in which they set forth that Eliza Harvey, late of that county, had died in the month of September, 1830, being at the time of her death the wife of Edmund B. Harvey, of said county; that by a certain contract or settlement entered into between the said Eliza and her husband previously to their marriage, and in contemplation of it, all the property of the said Eliza, consisting of lands, slaves, chattels and choses in action, "was assigned" to a certain Joseph Cannon, a party to the said settlement and the trustee of the said Eliza and Edmund; that in the said settlement it was covenanted by the said Edmund that the said Eliza should, during the coverture, have liberty and authority to make a will or appointment to the said trustee to convey the said property; and that, pursuant to the authority and liberty by said contract stipulated, she did, shortly before her death, duly make and publish her last will, of which the petition set
(187) forth a copy. The alleged will, after appointing the

beloved husband of the testatrix sole executor, directed the executor to sell as much of her perishable estate as was necessary for the payment of her debts; then to retain all the residue of her estate in his hands in trust for the term of his life or for twenty years, and to employ her land, negroes and other property so as to derive an income therefrom; and at his death, or at the expiration of the twenty years, to divide this *income* between the petitioners, Margaret and Mary, and the *principal* which might then be in his hands to be equally divided between the two sisters of the testatrix, Mary Smith and Margaret Parker. The petitioners further charged that the said Eliza died without altering or revoking the said will; that the said Edmund offered the same for probate at the November Term, 1830, of Perquimans County Court; "that an issue was made up, and at February Term, 1831, of said Court the paper-writing so offered as the will was found not to be the will of Eliza Harvey, deceased." The petitioners averred in their petition that at the time of these proceedings there were, and yet are, infants of tender years; that they were in no way parties to these proceedings; that their interest was wholly neglected and disregarded; that the paper writing so offered for probate was duly signed and duly attested; that the said alleged testatrix was, at the time of executing it, of sound and disposing mind, and that the said paper-writing, as the petitioners believed, could have been fairly and honestly proved as the last will and testament of such testatrix, had the petitioners been represented and their interests duly protected.

The petitioners showed by their petition that at the time of the death of the said Eliza her *heirs at law* were Mary Smith, Margaret Parker (since intermarried with James R. Burbage), Joseph W. Townsend, John P. Townsend, Calvin Townsend and Sarah Townsend, to whom the aforesaid Joseph was guardian; and that "on the intestacy of the said Eliza the said Edmund would have been her *distributee.*" The petitioners prayed that the persons so named as heirs at law and the said Edmund might be served with process to appear and on their corporal oaths answer the matters set forth in the petition; that the said paper- (188) writing might be again offered for probate, and the petitioners have such other and further relief as their case

required and to the Court should seem meet. This petition was verified by the oath of Thomas Clark, the next friend of the petitioners; thereupon process issued as was prayed, and the defendants, Joseph W. Townsend, Mary Smith, Calvin J. Townsend, Sarah Townsend and John P. Townsend filed their answers, in which they admitted that they were the heirs at law of Eliza Harvey, deceased; that she died at the time stated; that the marriage settlement containing the covenant recited in the petition was made as stated; that the paper-writing referred to was offered for probate as the last will of the said Eliza, an issue made up and the issue found as set forth in the petition; and that the petitioners, who they alleged are the daughters of Edmund Harvey, were not parties to those proceedings; but they denied the paper so offered to be the last will of the said Eliza, and on the contrary insisted that if the same was signed by her she was at the time utterly incapable, from defect of mind and memory, from making a last will. It appeared from the record that Edmund Harvey and James R. Burbage and wife, though served with process, put in no answer or matter of defense to the petition, and thereupon the petition was taken *pro confesso* and set for hearing *ex-parte* against them. At November Term, 1833, of the County Court the cause came on to be heard on the petition and answers, when the prayer for reprobate was granted and the following issue submitted to a jury, to-wit, whether the paper-writing exhibited for reprobate is the last will and testament of Eliza Harvey or not; and the jury, being impaneled, did say that it was not the last will and testament of Eliza Harvey, deceased, from which verdict the plaintiffs (the petitioners) prayed for and obtained an appeal to the Superior Court. At the Spring Term, 1834, of Perquimans Superior Court, Jesse Wilson, executor of Mary Smith, and Francis E. Smith and Josiah Smith, infants, by the said Jesse, their guardian *ad hoc*, were made parties defendants, and the cause was removed
(189) for trial, upon the application of the plaintiffs, to the Superior Court of Chowan; and at that Court, on the last circuit, before his Honor, *Judge Donnell*, a motion was made by the defendants "to dismiss the proceedings," which was ordered by his Honor, whereupon the plaintiffs appealed.

Bailey, for the plaintiffs, distinguished this case from the case of *Redmond v. Collins,* 15 N. C., 430, upon the ground that here the prayer for re-probate was granted in the County Court, and no appeal was taken from that order, but the plaintiffs themselves appealed from the verdict of the jury upon the issue made up to try the validity of the will. In *Redmond v. Collins* the appeal from the County Court was taken from the order of re-probate. To show that an appeal is sustainable upon an order for re-probate, the case of *Ward v. Vickers,* 3 N. C., 164, was cited.

Iredell, for the defendants, contended that the petition must accompany the appeal from the decision upon the issue in the re-probate; that the appeal could not be taken from the verdict, but from the judgment thereupon; and insisted that if the petition properly formed a part of the record upon the appeal, the whole case was carried up and was governed by that of *Redmond v. Collins, ubi supra.* As to the probate of wills of married women, he cited *Rich v. Cockell,* 9 Ves. Jun., 376.

GASTON, J., having stated the case as above, proceeded: It ought not to excite surprise that questions embarrassing to the bench, as well as to the bar, should present themselves upon applications for a revision of the proceedings upon probates of wills or refusal of probate to instruments offered as wills. The General Assembly, as the situation of our country and the character of its institutions seemed to require, have from time to time made important changes in the laws in relation to the mode of proving wills, the tribunal by which controversies respecting them shall be tried, and the effect of the probate when had, but have been wholly silent as to the proceedings by which those errors which are incidental to every human judicature may be examined and corrected upon probates granted or denied. The pro- (190) fession is therefore necessarily driven to adopt some mode which is at the same time analogous to the established usages before these changes were made, and reconcilable to the state of things induced by these changes. This adaptation of old forms to new laws is among the most delicate and difficult of legal labors. It has not yet been successfully effected upon this subject, and there is reason to fear that

several adjudications must be had before it can be completely accomplished.

On examining the record before us, the first inquiry which suggests itself is, did the appeal from the County to the Superior Court of Perquimans carry up *the petition* and all the subsequent proceedings thereon, or did it carry up only the issue ordered, after the prayer for the re-probate granted and the proceedings upon that issue? We can see no reason to doubt but that it was competent for the defendants to have appealed from the sentence of the County Court ordering the will to be propounded a second time for probate. It has been the usual course to appeal from such adjudications, and has never been disapproved of. There are obvious conveniences from the practice; for if the adjudication be erroneous it may be thus reversed without either party incurring the unnecessary expense of witnesses upon the issue. It comes within the fair construction of the Act of 1777 (Rev., ch. 115, sec. 75), which allows an appeal to the Superior Court "when any person, either plaintiff or defendant, shall be dissatisfied with *the sentence, judgment or decree* of the County Court." It is a sentence materially affecting the subject-matter in contestation, in form final on the *point* decided, and which the dissatisfied party ought to have an opportunity of reviewing in the appellate tribunal before it may lead to further mischief. Where the dissatisfied party neglects to appeal from such a sentence it is not regularly re-examinable in the superior tribunal. All objections thereto which may be waived by not being brought forward in apt time are waived, and the cause proceeds in the appellate court as it ought to have proceeded in the Court below
(191) subsequently to that sentence. But we are nevertheless of opinion that when, upon a petition for a re-probate, the same has been ordered, and an appeal takes place by either party from the ultimate sentence upon such re-probate, *that* appeal places the entire cause in the revising court; and it is *competent* for that court, upon discovering that the cause has never been rightfully constituted, and that however the facts may be found, *it* cannot make a decree for the parties instituting the cause, to dismiss the same altogether. The petition must be regarded as containing the allegations of those propounding the paper, and the ultimate

judgment must be founded on the allegations as admitted or proved. If they will not sustain a sentence for the party propounding, the Court is obliged to refuse to him such a sentence. The sentence below for admitting the proofs directing an issue is certainly, unless it had been made provisionally, a determination of the Court that the allegations proved—that is to say, found on the issue—will entitle the party to a final decree. But, though it be a sentence formally final on the point, it is not and does not purport to be a final sentence on the subject-matter of the petition; and if before a final sentence rendered in the revising court it should discover a fatal and incurable error in the cause as constituted, the Court is not obliged nor, as we conceive, at liberty to follow out this error to an injurious consummation.

It does not appear upon what ground the Superior Court ordered the cause to be dismissed. The counsel for the appellees states that it was done in obedience to what the Court below understood to be the law declared by this Court in the case of *Redmond v. Collins,* 15 N. C., 430. In that case we held that a mistake in a verdict upon an issue made up between the executor propounding and the next of kin caveating the will, without fraud or collusion, did not give the legatee a right to re-propound it for probate; that the legatee was represented by the executor, claimed through him, was a party by him and bound by the decree against him. It is impossible for us to see whether in truth the case under consideration comes within the application of the doctrines established in the case referred to. The peti- (192) tion states that Eliza Harvey was a married woman, who had her husband's permission to make a will, and who therefore could rightfully make a testament or will of personalty merely. Independently of the marriage settlement and of the uses and limitations therein declared, her husband, as husband, must have been the only person interested to contest such testament. By virtue of his marital rights (not as distributee, as the petition terms him) all her personal property, upon his surviving her, became either absolutely or *sub modo* his, and her next of kin were wholly without claim to them. But, according to the petition, all her property—real and personal—were by that settlement conveyed to a third person—Joseph Cannon, the trustee of the

said Eliza and Edmund. What, however, were the uses, trusts or limitations of that conveyance is not set forth, so that we are entirely ignorant to whom, according to the provisions of that settlement, the property was limited in the event of her dying intestate or without appointment. As a married woman, she could make no devise with or without her husband's permission; and, however a proper court may give effect to her appointment made under the form of a devise, no court can pronounce the testamentary disposition of a married woman of real estate the *will* of such woman. The petition states that the husband of the deceased propounded the will for probate, and that an issue was made up, but it does not set forth either the terms of that issue or the parties between whom it was joined. It could not have been joined between Harvey propounding the will as executor and Harvey caveating the will as husband. This would have been a solemn farce, and not an attempt to prove the will in solemn form. If it were joined between the executor and the *heirs at law,* who claimed no interest in the personal property, the finding decided only the matter involved in that issue, and this will not be presumed to be other than that which could rightfully be controverted between these parties—that is to say, an issue of *devisavit vel non.* Was it a will or not as to the lands therein attempted to be disposed of? This, to be sure, was an idle issue. It is
(193) impossible for the petitioners, whether that finding be or be not removed out of the way, to establish this instrument as a will of lands. They state upon their petition, and the will shows upon its face, that the supposed testatrix was a married woman, and therefore she *could* not devise. The court of probate had no power to establish this instrument, nor could the Superior Court of Chowan, if the jury had found the issue there pending in favor of these petitioners, have given a sentence establishing it as a will of land. Our Act of 1784 (Rev., ch. 225, sec. 6), making the probates of wills testimony for the devise of real estates, has not in any manner altered the law as to the incapacity of certain persons to devise real estate. The entire jurisdiction over this instrument as an appointment of real estate under the uses, trusts and powers of the marriage settlement belongs to a different tribunal, which can pronounce it a valid ap-

pointment when satisfied, according to its rules for investigating facts, that it has been executed with the solemnities required by that settlement. So far, then, as the sentence of dismission applies to the matter in controversy between the petitioners and the heirs at law, it appears to us to have been right upon the merits, and the petitioners have no cause to complain of it. But the sentence dismissed the petition altogether. Had not the petitioners a right to establish the instrument as a testament? Here we are met with difficulties which put it out of our power to make a decision upon the merits, not because of obscurity in the law, but because the case is so defectively stated as not to show upon what the law is to operate. It may be that nothing has been done in the first instance rejecting this instrument as a testament, and that what is apprehended as such may be a *mere nullity*. It may be that the propounder of the will, being directly interested to defeat it, he could not be the representative of these petitioners, or that his inattention to interests which he professed to protect was in law a fraud; or, on the other hand, it may be that the finding of the issue was between him, as their legitimate representative, and persons entitled to the personal property of the deceased, in the event of her intestacy. If so, mere inattention on his part is not (194) necessarily fraud. If so, unquestionably they ought to have an opportunity of contesting the present application for re-propounding the testament. It may be that after the finding of this issue an order for appointing an administrator was made; and if so, the administrator should have an opportunity of resisting the petition for calling in his letters. If this Court had a general power over the controversy it would be disposed to allow such amendments as would remove this uncertainty and enable it to see what was done in the former alleged attempt to prove the will, and decide what are now the rights of the parties interested. But it acts, although the case is brought before it by appeal, as a court of errors, having its attention confined to the record, and bound to render such judgment thereon as in law ought to have been rendered in the Superior Court. It will not, therefore, dismiss this part of the petition absolutely, or affirm the sentence of the Superior Court in this respect, but declare that the petition, so far as it seeks to re-propound the instrument

as a testament of chattels, is so defective and informal that the Court can pass no definitive sentence thereon, and that it be dismissed as informal and defective and without prejudice to the right of the petitioners to make such an application in due form to the proper court.

The decree below being neither wholly affirmed nor reversed, we shall give no costs to either party in this Court.

PER CURIAM. This cause coming on to be heard upon the transcript of the record from the Superior Court of Chowan, and being argued by counsel on both sides, it is considered by the Court that the sentence of the said Superior Court, whereby the petition of the petitioners and the proceedings thereon are dismissed altogether, is erroneous and ought to be reversed, and the same is reversed accordingly; and the Court, proceeding to render such sentence and judgment as in law ought to have been rendered by the said Superior Court,

(195) doth adjudge, sentence and decree, and it is adjudged, sentenced and decreed accordingly, that the said petition, so far as it seeks to propound or to re-propound the said last will of Eliza Harvey as a will disposing of lands from her heirs at law, the defendants, be dismissed, with costs, to the said defendants in the County and Superior Courts, because the said Eliza was at the time of the pretended execution of said alleged will a *feme covert* and therefore by law incapable of making a devise of lands; and that the said petition, so far as it seeks to propound or re-propound the said alleged last will as a will or testament of the said Eliza, made with the permission of her husband, is so uncertain, defective and informal that this Court cannot see what of right ought to be done therein, and therefore the same, and the proceedings thereon, are dismissed as informal, defective and uncertain, and without prejudice to the right of the petitioners to propound or re-propound the same as the testament aforesaid of the said Eliza, before any proper court in due and right form. And it is adjudged that the parties pay their costs in this Court, respectively.

Cited: Newlin v. Freeman, 23 N. C., 521; *Sawyer v. Dozier,* 27 N. C., 103; *S. v. Laws,* 29 N. C., 376; *Masten v. Porter,* 32 N. C., 3; *Anders v. Anders,* 49 N. C., 245; *Millsaps v. McLean,* 60 N. C., 82; *Minor v. Harris,* 61 N. C., 324.

STATE v. JAMES BALDWIN, SR., et al.

1. To render an act indictable as a nuisance, it is necessary that it should be an offense so inconvenient and troublesome as to annoy the whole community, and not merely particular persons. Therefore, where it was charged that the defendants assembled at a public place, and profanely and with a loud voice, cursed, swore and quarreled in the hearing of divers persons then and there assembled, whereby a certain singing school was broken up and disturbed, *ad commune nocumentum;* it was *held,* that the indictment could not be sustained as one for a common nuisance.

2. An indictment which states no unlawful purpose, and sets forth no act which the defendants assembled to commit, cannot be one for an unlawful assembly.

3. Nor is one which charges no act of violence, or an act fitted to inspire terror, nor any attempt to commit an act of violence, which, if committed, would make the defendants rioters, an indictment for a riot or a rout.

THIS was an indictment against the defendants, seventeen in number, in the following words:

"The jurors for the State, upon their oaths, pre- (196) sent: That James Baldwin, Sr., etc., all late of Bladen, on the ninth day of August, in the present year, at a certain public place, to-wit, at Swindall's Meeting House, in said county, unlawfully did assemble and gather together, and then and there, in the hearing of divers good citizens of the State then and there assembled, unlawfully and profanely and with a loud voice, did curse, swear and quarrel, by means whereof a certain singing school then and there kept and held in said meeting-house was then and there disturbed and broken up, to the great damage and common nuisance of the good citizens of the State and against the peace and dignity of the State."

At Bladen, on the last circuit, a motion was made to quash the indictment, which was sustained by his Honor, *Judge Seawell,* and Mr. Solicitor Troy appealed.

The Attorney-General, for the State.

No counsel appeared for the defendants.

GASTON, J. Where an indictment is so defective that a judgment thereon rendered against the defendant would be

erroneous, the Court *may* quash it in the first instance without requiring of the defendant to plead. But this power is purely discretionary. Unless the defect be gross and apparent, the Court, instead of dismissing the indictment in this summary way, will leave the defendant to his demurrer, or motion in arrest of judgment, or writ of error, according to the regular mode of proceedings; and where the offenses charged are of a heinous character it usually refuses to quash indictments, however obvious may be their defects. So far as the decision below is to be regarded as a matter of discretion, this Court feels itself not authorized to revise it. It is for us to inquire whether it be erroneous in point of law, and the determination of this question must depend on the sufficiency of the indictment as it would appear if examined on demurrer, motion in arrest, or writ of error.

What is the offense set forth in the indictment? It is not that of an *unlawful assembly.* It, indeed, avers that
(197) the defendants, seventeen in number, did unlawfully assemble and gather together, but it states no unlawful purpose, and it sets forth no act which they assembled to commit, so as to enable the Court to judge that their design was illegal. *Regina v. Gulstan,* 2 Lord Raym., 1210. Nor is it the offense of a riot or rout, for it does not charge any act of violence or any act fitted to inspire terror; nor does it charge any attempt to commit an act of violence which, if committed, would have made them rioters. 3 Ins., 176; 1 Haw., ch. 65, sec. 4, 5 and 8. It has been insisted, however, on the part of the State that this is a good indictment for a nuisance. To render an act indictable as a nuisance, it is necessary that it should be an offense so inconvenient and troublesome, as to annoy the whole community, and not merely particular persons. The indictment in question affirms this of the act charged, for it declares it to have been done "to the great nuisance of the good citizens of the State." But it is not only proper that an indictment should specify the criminal nature and degree of the offense, which are conclusions of law from the facts, but it is necessary that it should also specify the particular facts and circumstances which constitute the offense. This indictment, therefore, before it can be sustained as one for a common nuisance, ought to contain a specification of such facts and circumstances as will

warrant the averment of an annoyance to the community. If the facts charged must, from their very nature, have created a nuisance to the citizens in general, the words *ad commune nocumentum,* though always proper and safest to be inserted, may be omitted, for they neither describe the crime, nor the facts which constitute it. *Such* facts necessarily show the crime. If the facts charged show an offense inconvenient and troublesome, that *may* have extended its annoyance to the community, or may have reached only certain individuals of that community, the averment of *ad commune nocumentum,* becomes indispensable. It then involves an actual inquiry as a matter of fact for the jury, into the *extent* of the annoyance. But an allegation in an indictment that certain facts charged were "to the common nuisance of all the good citizens of the State," will not make it a good indictment for a common nuisance, unless these (198) facts be of such a nature as *may* justify that conclusion as one of law as well as of fact.

The act here charged is not made up of a number of acts frequently repeated, and which cannot be distinctly and specially set forth without inconvenient prolixity. It is an act single and distinct, and committed on a particular occasion. It is charged that the defendants assembled at a public place, and profanely and with a loud voice cursed, swore, and quarreled, in the hearing of divers persons, and it is alleged, that by means thereof a certain singing school then and there kept and held was broken up and disturbed. This profane and loud cursing and quarreling on *that particular occasion,* might have been an annoyance to those who heard and witnessed it; but it could not have been an annoyance to the citizens in general, unless there were some *other* facts in the case. If there were such other facts, then these ought to have been set forth; for an indictment must specify all the facts which constitute the offense. It is possible that a frequent and habitual repetition of acts which singly are but private annoyances may constitute a public or common nuisance. But if so, this frequent and habitual repetition should be appropriately charged. No injurious consequences of an abiding kind, and therefore affecting not simply those present at the commission of the act, but affecting the citizens successively, and as they come within the reach of these consequences, are

charged, or can be presumed to have followed from the act. "The singing school" is indeed said to have been broken up and disturbed. Of whom that school was composed does not even appear, but whether it consisted of the defendants or of others, its interruption cannot be legally pronounced an inconvenience to the whole community. The loss of instruction in the accomplishment, to those who would fain acquire it, does not very gravely influence the good order or enjoyment or convenience of the citizens in general, so as to call for redress on the complaint of the State.

(199) If we sustain this as an indictment for a common nuisance, we shall be obliged to hold that whenever two or more persons talk loud or curse or quarrel in the presence of others, it may be charged that this was done to the common nuisance, and if so found, will warrant punishment as for a crime. This would be either to extend the doctrine of common nuisances far beyond the limits within which they have hitherto been confined or to allow of a vagueness and generality in criminal charges inconsistent with that precision and certainty on the records so essential as restraints on capricious power and so salutary as the safeguards of innocent men.

Independently of the averment "to the common nuisance," the indictment contains no criminal charge. No conspiracy is alleged, no special intent or purpose is averred, which would impress an extraordinary character on the act done. The persons disturbed are not represented as having been engaged in the performance of any public duty—as engaged in religious worship, attending at an election or at a court. Upon a demurrer to the indictment, we should be unable to render a judgment for the State. It is our opinion, therefore, that there is no error in the proceedings below, and that the judgment appealed from must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: S. v. Jones, 31 N. C., 40; *S. v. Hughes,* 72 N. C., 27; *S. v. Heaton,* 81 N. C., 545; *S. v. Brewington,* 84 N. C., 784; *S. v. Crisp,* 85 N. C., 530; *S. v. Wilson,* 93 N. C., 610; *S. v. Harper,* 94 N. C., 939; *S. v. Hollingsworth,* 100 N. C., 537; *S. v. Harwell,* 129 N. C., 552.

STATE v. ZACHARIAH BLYTHE.

An indictment under the Act of 1826, ch. 13, charging that the defendant, on a particular day, and on divers other days before that day, sold and delivered spirits to certain slaves whose names were to the jurors unknown, is defective for uncertainty in embracing the transactions of divers days with divers persons. And as the names of the slaves were not given, it is also defective for not stating the owners of the slaves, or averring that the owners were unknown, if the fact were so.

THIS was an indictment in the following form:

"The jurors for the State upon their oaths present, that Zachariah Blythe, late of said county, on the twenty-sixth day of October, 1834, and on divers other days (200) and times before said day, at and in the county aforesaid, did unlawfully traffic with, sell, and deliver to certain negro slaves, whose names are to the jurors as yet unknown, a quantity of spirituous liquors, not having then and there any written authority from the owners of said slaves to sell and deliver the spirits aforesaid, contrary to the act of the General Assembly in such case provided, and against the peace and dignity of the State."

The defendant being convicted of the offense charged in the indictment, a motion in arrest of judgment was submitted by his counsel, which, being sustained by his Honor, *Judge Norwood,* at NORTHAMPTON, on the last circuit, the *Attorney-General* appealed.

The Attorney-General, for the State.

Badger, for the defendant, objected that the indictment was defective for uncertainty and indefiniteness:

1. Because it charged the selling to be to a number of slaves in gross, on a certain day and divers other days, whereas it should have been for one act of selling to one or many slaves, or for frequent acts of selling to one slave.

2. Because the slaves to whom the spirits were sold were not specified, either by their own names or by those of their masters, and no good reason was stated for the omission. He contended, in support of this objection, that the names of the owners of the slaves should have been charged, because that knowledge might have been of service to the de-

fendant in his defense; but if the names of the owners were unknown, then that fact should have been distinctly averred in the indictment.

RUFFIN, C. J. We concur in the opinion given by the Judge of the Superior Court, that the indictment is defective, and that the judgment must be arrested. It charges that the defendant, on a particular day, and on divers other days and times before that day, sold and delivered spirituous liquors "to certain slaves, whose names to the jurors are as yet unknown."

Every indictment ought to have convenient certainty as to time, place and persons, and give to the accused (201) reasonable notice of the specific facts charged on him, so that he may have an opportunity of defending himself. Here the indictment conveys no information of that sort. It is not confined to a single joint sale to several persons, but embraces the transactions at large of divers days with divers persons. It is like an indictment in one count for divers distinct assaults and batteries on several persons at different times. To such a complication of separate accusations the defendant ought not to be obliged to answer; and in this case he could not form the least conjecture of the facts to be proved against him, nor those to which he should prepare evidence.

Besides that, we think the indictment does not sufficiently identify the slaves. It is true, the defendant might, by proper averments upon a second indictment, show the identity of the slaves mentioned in both. But he ought not to be put to greater difficulty in sustaining his averments than is unavoidable. Here the description is barely that of being slaves, the names of the slaves not being given, nor their sex, nor the name of the owner, nor any other mark of identity. From necessity, indictments, alleging the name of a person to be unknown, are sustained when they are really unknown. But in general, the name must be given, and always, unless it be stated to be unknown. The Christian name alone will not suffice, unless the occupation or station be added, so as to identify the person from all others, as in the case stated in the books, *John, Priest of A.* As slaves have only one name in general, that alone may be sufficient when stated. But it

is by itself not very satisfactory, because there is a more perfect mode of identifying the person, by stating him to be a slave named A, the property of a particular person, so as to distinguish this from other slaves of the same name. That is the usual method of describing a slave in ordinary transactions as well as in legal proceedings. For this purpose, proof of reputed ownership would probably support the allegation. But although it may not be necessary to state the owner, where the slave is described by his name, yet where the name of the slave is not given, and cannot (202) be given, because unknown, he may to some extent be identified by stating whose property he is. That is a step towards distinguishing the particular person, and would not leave the proof at large of any and all slaves. It is not doubted that the indictment would be good if it alleged the name of the slave and the owner of the slave to be both unknown. But the indictment ought so to state as to both facts; and we think it is but demanding reasonable precision to a common intent to require the property to be set out, as part of the *descriptio personæ,* when the name of the slave is unknown. If neither the property nor the name be given, as each goes equally to the identity, the excuse for not doing so ought to appear in the indictment, by the statement that the former was unknown, as well as the latter. That allegation is as proper and necessary as to one part of the description as it is in respect of the other.

PER CURIAM. Judgment affirmed.

Cited: S. v. Faucett, 20 N. C., 241; *S. v. Stamey,* 71 N. C., 203.

SAMUEL P. SIMPSON v. JOHN H. HARRY.

1. The word "appeal," in sec. 9, of the Act of 1794 (Rev., ch. 414), is not used in its technical sense, and it is not therefore necessary or regular for the magistrate to pass upon a claim of a third person to property attached, before such person can carry his case to the County Court.

2. The claim of an interpleader to property attached, must be a *legal* claim; a mere *equitable* one will not entitle the interpleader to the property attached.

3. No claim can be interposed by a third person to a *debt* attached in the hands of a garnishee, as nothing but *tangible* property comes within the words or the spirit of the law allowing an interplea.

THIS was an ATTACHMENT and interpleader under the following circumstances: The defendant, John H. Harry, on 7 January, 1832, sued out an attachment returnable before a single justice, against John R. Dunn, an absconding debtor, and summoned William Boydton as a garnishee. On the same day Boydton appeared and acknowledged that he had money enough in his hands (of the said Dunn's) to pay the amount claimed by the plaintiff in the attachment. (203) Thereupon the said amount was condemned in the hands of the garnishee to satisfy such recovery as might thereafter be had by the plaintiff against the defendant in the attachment. On 7 February, 1832, the present plaintiff, Simpson, interposed a *claim* to the money in the hands of the garnishee, which being rejected by the magistrate, he appealed to the County Court. Having failed upon an issue to the jury in establishing his claim there, he appealed to the Superior Court, where upon a trial had before his Honor, *Judge Settle,* at LINCOLN, on the last circuit, he offered evidence tending to establish the following case: Dunn, some time before the issuing of the present defendant's attachment, had obtained a judgment before a single justice, against a man of the name of McLelland, and being indebted to the present plaintiff in a larger sum of money, on 24 December, 1831, gave the plaintiff a written order on the constable, who was supposed to have possession of the judgment, to deliver the same to the plaintiff, as having been assigned to him. The judgment, however, was not in the hands of the constable, but had been left in the custody of

the magistrate, who rendered it. The constable, therefore, on the presentation of this order, which was on the day of the date, gave the plaintiff an order on the magistrate for the judgment; but as the magistrate was out of the State, it was not then, nor did it appear to have been at any time afterwards, presented to him. When the judgment was rendered, McLelland, having given surety for the stay of execution, requested the justice to keep the judgment, assuring him that it should be paid before the expiration of the stay. It did not distinctly appear whether before or after 24 December, 1831, but at all events before 7 January, 1832, McLelland called at the store of the magistrate for the purpose of paying up the judgment, and the magistrate being absent, Boydton, his partner, who had access to his papers, received the money from McLelland, and delivered up the judgment to him. After the attachment was issued, and after Boydton had given in his garnishment, and after the money which he admitted himself to owe to Dunn was condemned to answer the recovery which might (204) be made by the plaintiff in the attachment, Simpson, the plaintiff in this interpleader, gave notice to Boydton of his assignments, and claimed the money received by him. Boydton refusing to pay it, he then interposed his claim to it before the magistrate who was acting upon this attachment. His Honor, upon these facts, instructed the jury that the plaintiff had but an *equity* to the money, and not the *property* therein, and the jury found accordingly against his claim of property, and he appealed.

Devereux, for the plaintiff, contended: 1. That under the Act of 1794 (Rev., ch. 414, sec. 9) an interpleader had a right to urge either a legal or an equitable claim.

2. That in this case the money was in the custody of the law, the magistrate, or Boydton, being in a situation analogous to that of a clerk of a court of record; and cited the cases of *Overton v. Hill,* 5 N. C., 47, and *Alston v. Clay,* 3 N. C., 171.

3. That if the claim of Simpson to this debt, before payment, was an equitable one, by the subsequent payment the trust was closed, his title became legal, and he might then

maintain *assumpsit* for money had and received to his use; and for this was cited *Cooper v. Wrench,* 16 E. C. L., 51.

No counsel appeared for the defendant.

GASTON, J., after stating the case, proceeded as follows: It may not be amiss to state that the proceedings upon this interpleader have not been strictly regular. Sec. 9 of the Act of 1794 (Rev., ch. 414), which directs the mode of proceeding where property attached is claimed before a justice, directs that where any property attached as aforesaid shall be claimed by any other person, and to determine the right the intervention of a jury may be necessary, the party claiming such property may *appeal* to the next County Court, where such right upon issue joined shall be tried by a jury; the party claiming entering into a bond with sufficient security to pay all costs and charges in case he shall fail to prosecute *the suit* with effect. The term "appeal," (205) we do not understand as having been here used in its *technical* sense, the calling upon a superior to correct injustice in the *decision* of an inferior tribunal; but the calling on a Superior Court to take cognizance of a matter pending in the inferior tribunal, and which, from its constitution, the latter is not fitted to determine. The claim of property is supposed to be one in which the intervention of a jury may be necessary, and as there is no jury in the Magistrate's Court, the claimant in the interpleader appeals *his suit,* that is to say, removes it for trial to the County Court, where such a jury can be had. There was no necessity, therefore, for the magistrate's proceeding to any adjudication upon the claim, and such adjudication was a nullity. Whenever the case is one in which an interpleader is allowed the claimant is entitled to remove his claim to the County Court, upon complying with the terms prescribed by the act. The irregularity, however, in this case furnishes no ground for reversing the judgment of the Superior Court, for the claim has been acted upon, both in the County and Superior Courts, precisely as it would have been had not the magistrate passed upon it.

We are of opinion that there is no error in the instruction given by his Honor on the trial of the issue in the Superior

Court. Judgments are not assignable at law, and however the transfers of them may be protected in equity, they unquestionably pass no legal interest. The present plaintiff was not the legal owner of Dunn's judgment, and Boydton, by the receipt of the money upon it, did not become legally the debtor of the present plaintiff. If, after the receipt of the money, and with a knowledge of the assignment, he had promised to pay the money to the plaintiff, he would have made himself liable by such assumpsit. If before the receipt of the money he had been apprised of the assignment, and had collected it as agent for the plaintiff, he would have been liable as for so much money received to the use of the plaintiff. But a mere equitable interest in the judgment could not *per se* create a legal property in the money due or paid upon the judgment, in whose hands soever it might be. But it is insisted, in behalf of the appellant, that his claim was supported by showing an equitable interest (206) in the money, for that it is the purpose of the attachment laws to subject to the demands of creditors only such moneys as are *equitably and truly* due to their debtors, and not such as are due to them in trust for others. We admit the argument, but deny the inference. We admit that it is not the purpose of the attachment laws to subject to the demands of creditors either property held by, or debts due to, absconding debtors *as trustees* for others. If upon the garnishee's examination, or on a disputed issue growing out of a garnishment, it shall appear that the garnishee holds effects of, or is indebted to the defendant, as the trustee of another, the Court ought not and will not, condemn those effects, or that debt, as liable to the satisfaction of the demands of the attaching creditor. Such creditor would thereby be converted into a trustee for the rightful owner; and the proceeding would be a perversion of the very intent and purpose of the law of attachments. But if the garnishee sets up no such defense, and states no facts from which it can be inferred, we are at a loss to conceive how it can be brought before *that* court. The privilege of interposing a claim is given by law to him, and to him only, who has the right to the property; and the issue upon the claim is, *in whom is the property claimed? This* must mean the legal ownership. Such an issue, wherever tried, can mean nothing else. If the claimant has not the

legal interest *in* the property, the issue cannot be found for him. The equitable owner is not without redress. He can have recourse against the garnishee who hath held back the facts which would have prevented condemnation; or he may invoke the aid of a proper court to stop the proceedings. He can pursue either of these courses, whenever the nature of the property, or the magnitude of the debt, will induce a Court of Equity to take jurisdiction of an equitable demand—and where it will not, he is in no worse condition than he was in before.

As the alleged error on which the plaintiff seeks a reversion of the judgment against him does not exist, it is not *necessary* that we should state any other reason for affirming the judgment. But we have been struck with the character of the claim here interposed—*a claim to a debt*—and are apprehensive that our silence upon a point so obviously presented to our notice might be construed into an implied sanction of such a course of proceeding. We understand *all* the provisions in the attachment laws, permitting third persons to interpose claims, as applying only in the cases *ordinarily* indicted by the words used. Creditors are enabled by means of these laws to obtain satisfaction of their demands against their absconding debtors out of either or both of two funds. The first is such of their property as may be levied on, seized and sold; the second, out of debts due to them from third persons. Special provisions are made for prosecuting the remedy by attachment, applicable to the pursuit against these respective funds. For debts due from third persons, judgments are to be rendered against them. As to the property which can be seized, it is to be levied on, and is to be sold by *venditioni exponas*, as the property of the defendant liable to execution. It is when property is attached—of a tangible kind—the subject-matter of an execution—that third persons have a right to come forward and insist that the property so attached is *their* property, and not that of the absconding debtors. If the persons summoned as garnishees choose to admit that they owe money to the defendants in attachment, which in truth is not due, and thereby subject themselves to judgments for which they are not liable, the actual creditors of these garnishees have no *legal* right to interpose. Judgments against the garnishees

(207)

for what they admit to be due, *touch* not the debts due from the garnishees to others. They produce no seizure, no sale of the latter—and leave the remedies of these creditors and all the means of enforcing them precisely as they were. These creditors have no more *legal* right to interpose against the rendition of such judgment than against the voluntary confession of judgments by their debtors to persons bringing suit against them by original process. But where the property of third persons is specifically levied upon by attachment, as the property of an absconding debtor, the proceeding is against that very *corpus*—and the law to prevent the direct injury arising from the interruption to its enjoyment, (208) and the possible injury that may attend its removal, has provided a mode by which the right to it may be immediately asserted. As well, therefore, from the objects intended to be effected by the Legislature as from the words used, we are of opinion that the claimant, if he had had a legal right to the money received by Boydton on the judgment against McLelland, could not interpose a claim against the plaintiff in attachment to the debt which, *he* says, Boydton owed to *his* debtor.

PER CURIAM. Judgment affirmed.

Cited: Gaither v. Ballew, 49 N. C., 491.

STATE v. SOLOMON ROPER.

An indictment which charges an indecent and scandalous exposure of the naked person to *public view in a public place,* is sufficient, without charging the act to have been committed in the presence of one or more of the citizens of the State.

THE defendant was convicted at BURKE, on the last circuit, before his Honor, *Judge Settle,* upon the following indictment:

"The jurors for the State upon their oaths present, that Solomon Roper, late of said county, on the first day of September, in the year of our Lord one thousand eight hundred and thirty-three, with force and arms in said county, being

an evil-disposed person, and contriving and intending to debauch and corrupt the morals of the citizens of said county, on a certain public highway in said county did indecently and scandalously expose to public view the private parts of him the said Roper, to the evil and pernicious example of all others in like case offending, and against the peace and dignity of the State."

After his conviction, the defendant's counsel moved in arrest of judgment "that the bill of indictment was defective in not charging that the offense was committed in the pres-
ence of one or more good citizens then and there as-
(209) sembled." His Honor overruled the motion, and pronounced judgment, from which the defendant appealed.

No counsel appeared for the defendant.
The Attorney-General, for the State.

GASTON, J., after stating the case, proceeded: We consider it a clear proposition that every act which openly outrages decency and tends to the corruption of the public morals is a misdemeanor at common law. A public exposure of the naked person is among the most offensive of those outrages on decency and public morality. It is not necessary to the constitution of the criminal act that the disgusting exhibition should have been actually seen by the public; it is enough, if the circumstances under which it was obtruded were such as to render it probable that it would be publicly seen, thereby endangering a shock to modest feeling, and manifesting a contempt for the laws of decency. In the description of every indictable offense it is always advisable that the charge should be made to conform to approved precedents. A departure from them is viewed with suspicion. Yet where there are no precise technical expressions and terms of art required, so appropriated by the law to the description of an offense as not to admit a substitute for them, it is sufficient that the indictment charges in intelligible language, with distinctness and certainty, all the substantial circumstances which constitute the offense. In 2 Chit. Crim. Law, 41, we have a precedent of the indictment which was used in the case of *The King v. Crunden.* It

consists of two counts. The first charges that he exposed himself naked and in an indecent posture near to, and in front of divers houses, and also near to a certain public highway, and also in the presence of divers of the king's subjects; the second charges that he exposed himself naked to divers of his majesty's subjects. In 2 Campb., 89, we have a report of the case. The defendant was convicted on evidence that he bathed in the sea, dressing and undressing on the beach opposite to the East Cliff at Brighton, on which cliff there was a row of inhabited houses, from the windows of which he *might* be distinctly seen, as he was undressed and swam in the sea. The allegation that (210) this indecent exhibition was made in the presence of divers persons was satisfied by proof that it took place in their vicinity, and so that it might have been seen. The allegation means no more, and any other allegation which distinctly and explicitly avers as much will as effectually answer to describe the offense. The averments in this indictment, that on a certain public highway the defendant did indecently and scandalously expose to *public view,* can mean nothing less than that the indecent exposition was so made that it might have been seen by *numbers.* The necessary constituents of the crime are therefore stated, and there was no error in overruling the motion in arrest.

This opinion will be certified to the Superior Court of Burke, with directions to proceed to judgment and sentence against the defendant agreeably to this decision and the law of the State.

PER CURIAM. Judgment affirmed.

Cited: S. v. Wright, 51 N. C., 27; *S. v. Pepper,* 68 N. C., 261.

DEN ex dem. HENRY B. VAN PELT et al. v. LITTLEJOHN PUGH.

1. The Acts of 1777 (Rev., ch. 114, sec. 11) and 1783 (Rev., ch. 185, sec. 14), which require grants to be recorded in the Secretary's office, do not impose upon the grantee the burden of showing affirmatively that it has been done. The non-recording, if an available objection at all, must be shown by him who makes it. But *it seems* that such an objection is not available at all.

2. Slight and immaterial mistakes in the recording of a grant will not avoid it.

EJECTMENT, tried before his Honor, *Judge Strange*, on the last Fall Circuit, at CURRITUCK.

Upon the trial, the plaintiff, in support of his title, offered in evidence an original grant from the State to Daniel Van Pelt. The grant was No. 531, was under the great seal, signed by the Governor and countersigned by the Secretary of State, dated 24 May, 1810, for one hundred and fifty acres of land lying in the county of Currituck, described more particularly by certain lines and boundaries,
(211) and corresponding with the tract described in the declaration. This grant was duly registered in the Register's office of the County of Currituck, and this memorandum was endorsed on it: "Recorded in the Secretary's office; Wm. M. White, P. Sec." To show that this grant had been recorded in the Secretary's office, the plaintiff introduced as evidence what he alleged was a copy of the grant from the books of that office, certified by the Secretary himself. This document purported to be a copy of a grant of the same number, to the same person, for the same quantity of land (interposing, however, between the words "acres of" and "land" the word "marsh"), lying in the same county, of the very same date, the same beginning, and also describing the boundaries as mentioned in the original grant, except in two particulars, viz.: First, the distance and termination of the first line, as described in the original, were "85 chains to the point next to *Anderson's* Island." In the copy they were "85 chains to the point next to *Adderson's* Island." The second variance was in the description of the second line; the original calling for a course and distance "S. 55° E. *one chain* and seventy-five *links*"; the copy for "S. 55° E. seventy-

five," leaving out the words *one chain* and also the word *links*. The defendant contended, from these variances, that in law the grant had never been recorded in the Secretary's office, and was therefore void and should not be read in evidence. His Honor permitted the grant to be read; whereupon the plaintiff had a verdict, and the defendant appealed.

Iredell, for the defendant.
Kinney, contra.

DANIEL, J., after stating the case as above, proceeded: It is here contended for the defendant that from the facts disclosed in the case, the grant to Daniel Van Pelt never was recorded in the Secretary's office, and that it is void by force of the Act of 1777 (Rev., ch. 114, sec. 11). That section of the act is in these words: "That the Secretary shall make out grants for all surveys returned to his office, which grants shall be authenticated by the Governor and countersigned by the Secretary and recorded in his office, (212) ready to be delivered to the parties to whom the same shall be made, on the first day of April and October in every year; and every person obtaining a grant for lands shall, within twelve months after such grant shall be perfected as aforesaid, cause the same to be registered in the register's office of the county where the lands shall lie; otherwise such grant shall be void." This Court, in the case of *Slade v. Green,* 9 N. C., 226, put a construction upon this section of the Act of 1777. It is there said "that the grant is directed to be registered in the Secretary's office, but it is made the duty of the Secretary to have it done, and the grantee ought not to be injured by his neglect. By the same *section* it is made the duty of the grantee to have it registered in the county where the lands lie, and in case of neglect it is declared void; but this penalty is not referable to the first part of the section, which directs registration in the Secretary's office. That would be inflicting punishment on the innocent which is due to the guilty." We think this is a correct construction, and therefore concur in the same. But the land offices were closed by the Act of 1781 (Rev., ch. 172), and the Act of 1777 was repealed so far as it was inconsistent with the latter act. The Act of 1783 (Rev., ch. 185) re-

opened the land offices; and sec. 14 of this act is the same *verbatim* with sec. 11 of the Act of 1777, except the sentence "otherwise such grants shall be void," which is omitted.

The act of Assembly does not require of the Secretary to endorse upon the grant, before its delivery to the grantee, a certificate that it has been recorded in his office; and we learn from the Secretary that from the period when the proprietary government ceased, more than a hundred years ago, until since he came into office, no such endorsations have ever in fact been made. It has been usual to require from the assistants in the office a memorandum of the recording for the information of the Secretary and to govern him in the delivery of the grants. In the absence of any positive requirement of such a certificate, and from the long usage which we (213) regard as high evidence of this, and the former laws on the same subject, we hold that a grantee is not bound to show affirmatively that his grant has been recorded. The entire ground of the defendant's objection is taken away, because he did not show that the grant had not been recorded. Upon the delivery to the grantee the presumption of law is that the grant has been perfected, and this presumption must continue until it has been proved that the fact is otherwise. But, upon examining the supposed copy, it seems to us that the grant has been recorded, although inaccurately and defectively. The misprisions of the clerk are reprehensible, but do not annul the act. If registration *necessarily* implies an exact transcript, *literatim et verbatim,* the reason of the law for requiring the original to be produced in all cases where it can be had would fail. Errors and mistakes are incident to frail human nature. The original is always expected to speak more correctly than a copy. We think the evidence was admissible, and that the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Hughes v. Debnam, 53 N. C., 131.

RICHARD SPENCER et ux. v. BENJAMIN WESTON'S HEIRS et al.

1. The claim which a widow has for dower in the lands of which her husband died seized is not, before assignment, a "right or title" to the land, within the meaning of the Act of 1715 (Rev., ch. 2, sec. 3), and is not, therefore, barred by the limitations of that act.

2. Lapse of time is not of itself a legal bar, but only evidence in support of a bar, properly pleaded. Therefore, where there is no plea on the record to which lapse of time can apply as evidence, it cannot avail as a defense.

3. Damages for the detention of dower cannot be claimed for a period anterior to a demand for its assignment.

4. *Quære*, whether in this State dower is not necessarily assignable at law by petition only, and therefore that there can be no demand *in pais*.

PETITION for dower and damages for detention, filed by the *feme* and her second husband against the heirs and the assignees of the heirs at law of the former husband. It appeared that the former husband of the *feme* died seized, in 1804, intestate, and that no steps had been (214) taken to assert this claim until 1832, during all which time the land had been in the legal possession of the heirs and their terre-tenants. It appeared also that this land was not that upon which the former husband had his chief residence. The defendants answered and relied upon the statute of limitations, and upon the trial insisted likewise upon the lapse of time as a defense. His Honor, *Judge Strange,* on the last circuit, at HYDE, dismissed the petition, and the plaintiffs appealed.

No counsel appeared for either party.

DANIEL, J., after stating the case, proceeded: The petition for dower is by the act of Assembly substituted for the writ and declaration in an action of dower at the common law; and therefore the defendant always, if he has any defense to make, should plead or defend according to the course of the common law. It is not a chancery proceeding. *Whitehead v. Clinch,* 3 N. C., 3. We, however, consider the Act of 1715 (Rev., ch. 2), called the act of limitations, as having

been plead and relied on in this case. Is that act a bar to this petition? The widow had no estate in the land, for the law cast the freehold upon the heir immediately upon the death of the ancestor. Gilbert's Ten., 26. In this land she had not a right to *quarantine*, for it was not the land on which her husband had his chief house. Magna Charta, ch. 7; Thomas Coke, 584. The widow had no right of entry for dower until it had been assigned to her. She had no estate in the land until assignment. It is not until her dower has been duly assigned that a widow acquires a vested estate for life, which will enable her to maintain ejectment. 4 Kent, 60. On recovering at law, the sheriff delivers the demandant possession of her dower by metes and bounds, if the subject be properly divisible, and the lands be held in severalty. *Ibid.*, 62. In the English laws the wife's remedy by action for her dower is not within the ordinary statutes of limitations. *Ibid.*, 68. *Oliver v. Richardson*, 9 Ves., 222. A fine levied by the husband, *alone*, of lands which he was seized of during the *coverture*, and proclamations duly
(215) made, will bar the wife of her dower (5 Com. Dig. Pleader, 672), because the statute 4 Henry VII., by its second section, enacts that the proclamations so had or made should be final, etc., with a saving to every person or persons, and to their heirs other than the parties to said fine, of such right, title and *interest* as they have to or in the lands at the time of such fine engrossed, so that they pursue their title, claim or *interest* by way of *action or lawful entry* within five years next after the same proclamations had and made; with a further saving to all other persons of such action, right, title, claim and *interest* in or to the said lands, etc., as shall *first* grow, remain or descend or come to them after the said fine engrossed and proclamations made, by force of any gift in tail or by any other cause or matter had and made before the fine levied, so that they take their *action* or pursue their said right and title according to law within five years next after such action, etc., to them accrued, descended, fallen or come. When the right can be saved by entry to avoid the fine, it has been decided that the entry must be actual. *Doe v. Hicks*, 7 Term, 428; *Goodright v. Forrester*, 8 East, 552; *Symonds v. Cudmore*, Salkeld, 339; *Pomfret v. Windsor*, 2 Ves., 472; *Fen v. Smart*, 12 East, 444. But the widow,

never having a right of entry, is not affected by that part of the statute, but after the death of her husband she had her right of *action,* and the statute of fines requires every person or persons to pursue their title, claim or interest by way of *action or lawful entry.* A widow who has an interest in the lands for dower, therefore, must bring her action (her only remedy in case the heir or terre-tenant refuse to assign her dower) in five years after the fine and proclamations, or be forever barred. She cannot afterwards bring a writ of right, as no person who did not claim a fee-simple right in the lands could by the common law of England bring that writ.

The third section of the Act of 1715 declares that "no person or persons, nor their heirs, which shall hereafter have any *right* or *title to any lands,* etc., shall thereunto *enter* or *make claim* but within seven years next after his, her or their right or title which descend or accrue; and in (216) default thereof such person or persons so not entering or *making default* shall be utterly excluded and disabled from any *entry or claim* thereafter to be made." It is very clear that the plaintiff could not enter, because she had no estate in the lands to enter upon. But she had an interest, a right to one-third of the lands assigned her by metes and bounds for life. Must she "make claim" of this interest in seven years or be barred of her right of dower by an adverse possession for that length of time? A widow, before assignment of dower, has neither *"any right or title"* to the lands of which her husband was seized; she had only an interest in the lands for dower; therefore we think the Act of 1715 cannot be pleaded as a bar of her action to recover the same. She is not within the provisions of the act.

On the trial there was another objection taken to the plaintiff's recovery. It was the lapse of time intervening between the death of the husband and the filing of the petition. The Judge dismissed the petition, but upon which ground taken he does not state in the case. Lapse of time is not of itself a legal bar, but may be used as evidence to support a bar properly pleaded. Thus, at the expiration of twenty years without payment of interest on a bond or other acknowledgment of its existence, payment is to be presumed, but payment must be pleaded and an issue made to let in the evidence. So a jury may infer a grant of an incorporeal here-

ditament after an uninterrupted adverse enjoyment for the space of twenty years, but there must be some plea on the record to let in the evidence. In the case before the Court the defendants have not plead a release or any other plea to which their evidence could apply. It was immaterial evidence as the record and pleadings now stand.

As to the damages, it seems to us that as these proceedings are at law the plaintiff cannot claim damages for the detention of her dower, but from the time of her demand that dower should be assigned her. Thomas Coke, 586, 587. Whether in this State dower is not necessarily assignable at law by petition only, and therefore that there can be (217) no demand *in pais*, we do not decide, as here there was no demand before this suit. We are of opinion that the judgment should be reversed and the Superior Court directed to proceed in the cause.

PER CURIAM. Judgment reversed.

Cited: McMillan v. Turner, 52 N. C., 437; *Brown v. Morisey,* 124 N. C., 294; s. c., 126 N. C., 773.

DAVID C. FREEMAN et al. v. ALLEN GRIST.

Where attachments were issued, and a garnishee summoned, at the instance of different creditors, and at the same term of the Court, judgments were obtained against the garnishee in each case for the sum due by him to the attached debtor, and executions issuing thereon against the garnishee tested of the same term, were put into the hands of the same sheriff; the money collected by the sheriff must be applied to the executions *pro rata*, without regard to the priority of time in issuing the attachments and summoning the garnishee.

THIS was a rule obtained in the County Court of BEAUFORT upon the defendant, as the sheriff of said county, to show cause why the plaintiffs should not have their ratable proportion of a sum of money raised by him under the circumstances set forth in his return, which was as follows:

"A writ of attachment was sued out by *John Myers v. Lawrence Van Buskirk,* 17 January, 1834, and the same was

by him delivered to the Sheriff of Beaufort County and was by him served on Joseph Potts as garnishee. On the same day a writ of attachment was sued out by D. C. Freeman and George Houston against the same defendant, and the same was delivered to the said sheriff on the same day, but after that at the suit of John Myers was delivered; and the said sheriff, having both writs of attachment and notices on said writs in writing, served the same upon said Joseph Potts as garnishee, in manner following, to-wit: 'The writ of John Myers was first to me delivered, and I serve this notice on you, Mr. Potts. The writ of Freeman and Houston was next to me delivered, and I serve this notice on you also.' Judgments were regularly entered up in both of said causes, and the money in the hands of the said garnishee subjected in both and raised under executions issued in (218) both causes by said sheriff, which money is less than enough to satisfy the judgment recovered by John Myers against said garnishee."

The rule was discharged in the County Court, and the sheriff was directed to apply said money, first, to the satisfaction of the judgment in favor of the said John Myers, and the balance, if any, to the judgment of Freeman and Houston. From this judgment the plaintiffs appealed to the Superior Court, where, upon the last circuit at Beaufort, his Honor, *Judge Strange,* was of opinion that upon the statement nothing more was presented than the ordinary case of two judgments against the same individual at the suit of different plaintiffs obtained at the same term, and upon which executions had issued tested of the same term, for that the respective judgments against the garnishee were personal claims against him, and in the present state of the proceedings no question of specific lien arose. His Honor accordingly decided that the plaintiffs were entitled to have a *pro rata* distribution of the moneys raised by the sheriff under the circumstances set forth in his return. And from this decision the defendant appealed.

J. H. Bryan, for the defendant. Attachments were issued by Freeman and Houston and Myers against a northern debtor, and Potts was summoned as garnishee. He had no *tangible* property of the northern debtor in his hands, but was

indebted to him, and this debt was attached by Myers and by Freeman and Houston. The attachment at the instance of Myers was first issued; there was a judgment of condemnation, and there was also a judgment of condemnation in the other case. *Fi. fas.* were issued. The Judge was of opinion that the only question presented by the case was whether the money made was not equally applicable to all the *fi. fas.*, and therefore directed that it should be applied *pro rata*.

The act constituting the Supreme Court requires that that Court shall look into the whole record and render such (219) judgment as the Superior Court ought to have rendered. An examination of the whole record will show the facts above stated. If the property had been tangible and liable to the levy of an execution, there might have been some objection to a *fi. fas.* being issued instead of a *ven. ex.*, but here, after the garnishee rendering his statement and the *money due* being condemned to be applied to the claim of Myers, whose attachment was first issued, although the same proceedings were had in the other attachments, yet there does not appear to be any laches or waiver of the advantage which Myers derived from his superior diligence. In this case it was a *debt* which was subjected in the hands of the garnishee. In such case the garnishee is *summoned* and the judgment is against him absolutely for the debt attached. The question, then, is, did Myers gain a prior right of satisfaction by his superior diligence in having first issued his attachment? (There are authorities in the American Digest on this question, under the proper head, particularly a case from Bay's Rep.) The general opinion here sanctioned by the practice of our most eminent lawyers has been that the attachment first issued was entitled to the priority of satisfaction. Taking this to be so, how has this advantage been lost? It was not the duty of the attaching creditor to take care of the interests of the garnishee. He, the garnishee, might no doubt have pleaded to the subsequent garnishments that he had already been garnisheed or warned by the creditor, Myers, and thus protected himself from any loss beyond the fund in his hand.

No counsel appeared for the plaintiffs.

GASTON, J. It is possible that an inspection of the records on the suits wherein the respective judgments were rendered

and executions issued in behalf of the creditors against the garnishee might enable us to see more distinctly the facts out of which this controversy has arisen. But these are not referred to as making any part of the present case, and we have no right to invoke them as evidence. Confining our attention to the case before us, we are obliged to understand that a judgment was rendered in favor of Myers against Potts for a sum of money to answer such recovery as (220) he might effect against Van Buskirk; and that at the same term a judgment was also rendered in favor of Freeman and Houston against Potts for the same amount to answer such recovery as they might effect against the same defendant. If these two judgments were for one and the same debt due from Potts to the defendant in the attachments, it would seem as if gross injustice had been done to Potts. He could certainly have prevented this by distinctly stating in his second garnishment that he owed nothing to the defendant beyond a certain sum, which was already confessed to another plaintiff in attachment, and condemned to answer *his* recovery. But there are two judgments against him, and upon these executions severally issue, tested of the same term, which are delivered to the same sheriff. He is not only not bound, but is not at liberty to look beyond these executions. It is his duty to levy the amount commanded in each if the defendant has the ability to pay. What is raised upon them is, according to a series of adjudications which cannot be disturbed, to be distributed *pro rata* among the execution creditors, and for the balance not collected they can proceed against the sheriff or their debtor, accordingly as circumstances may render one or the other course expedient. There may be facts not appearing before us, and which perhaps could not with propriety be made to appear upon this application, which would, if shown to the proper tribunal, cause one or the other of these creditors to be inhibited from obtaining satisfaction of their judgment against Potts. But in the present state of things we think no other decision could have been rightfully rendered than that which was pronounced in the Superior Court.

PER CURIAM. Judgment affirmed.

(221)

MALCOM PURCELL v. ARCHIBALD McCALLUM.

1. A conveyance made to defeat, hinder, or delay a party injured by the erection of a mill, in the recovery of his damages, is fraudulent and void as to such party, and the owner or proprietor of the mill, notwithstanding such conveyance, continues still liable for the damages.

2. *Quære*, whether damages for an injury to the plaintiff's health can be assessed under that act.

PETITION filed in the County Court of ROBESON, at February Term, 1834, under the Act of 1809 (Rev., ch. 773), in which the plaintiff sought to recover damages for an injury sustained by the erection of a mill. The petition stated that the defendant, by the erection of his mill and dam, had not only overflowed the plaintiff's land, but had also greatly impaired the operation of his cotton gin by throwing water back upon its works. It stated likewise that the health of the plaintiff and his family had and was likely to suffer much from the same cause. After a verdict for the plaintiff in the County Court, and an appeal, the defendant entered together with the general issue, the following special plea: "That he was not the owner or proprietor of the mill and dam complained of in the petition since 27 September, 1833, at which time he conveyed the said mill and dam by deed to Edward McCallum, and that ever since the said date Edward McCallum was the owner and proprietor." To this plea the plaintiff replied "that the deed mentioned in the defendant's plea was not *bona fide*, but was made in fraud of the plaintiff's right to recover the damages sought in the petition." Upon the cause coming on to be tried at ROBESON, on the last circuit, before his Honor, *Judge Seawell*, upon the allegations of the petition and the issue of fraud, the defendant's counsel objected to the admission of any evidence to prove the fraud on the issue joined. The objection was overruled and the evidence received; and, under the instruction of the Court upon that part of the case relating to the injury sustained by the plaintiff's cotton gin, the jury returned the following verdict: "That the annual damages which the plaintiff sustains by reason of the overflowing of his land

(222) by the water, as charged in the petition, amounts to

thirty dollars, of which twenty-five results from damages done to the cotton gin, and they assess no damages for the injury to the plaintiff's health, as sought and charged by the petition. And they further find for the plaintiff on the issue of fraud." From the judgment rendered on this verdict the defendant appealed.

Winston, for the defendant, argued, upon the question of fraud, that the Act of 1715 (Rev., ch. 7) was designed to avoid alienations which were fraudulent as to creditors by preventing them from reaping the fruits of their executions; that the defeating, hindering or delaying creditors was what constituted the fraud against which the statute was aimed; that this could not apply to a case where the alienation could not disturb the remedy of the plaintiff; and that all cases where a nuisance was created by the erection of a mill an alienation of the mill furnished in the alienee a person from whom the party injured could obtain ample recompense. He contended that a proper construction of the Acts of 1809 (Rev., ch. 773) and 1813 (Rev., ch. 863) showed that the "owner or proprietor" of the mill, whether the rightful or wrongful owner or proprietor, was the person liable for damages accruing during the time of such ownership; and that if he who erected the mill disposed of his interest therein, he could not be made responsible for the continuance of the nuisance after such disposition. The counsel then went into an examination of the law upon the different remedies against nuisances, by *quod permittat,* assize of nuisance, and the action on the case which was substituted for the assize; and he stated the effect which the alienation of him who created the nuisance had upon these remedies. He adverted to the Statute of West., 2 (13 Edw. I., ch. 24; 2 Inst., 405), illustrating it by reference to the construction placed upon the Statute of 3 and 4 William and Mary, in the cases of *Gawler v. Wade,* 1 Peere Williams, 99, and *Warren v. Stowell,* 2 Atk., 125. He also cited *Fetter v. Beal,* 1 Lord Raym., 339, 682; *Beswicke v. Cunden,* Cro. Eliz., 402; *Penruddock's case,* 5 Rep., 101b.; 16 Vin. Abr., 32; Nuisance, K., 2; *Rosewell v. Pryor,* Salkeld, 460; 1 Lord (223) Raym., 713, to prove the position that after alienation the alienee was the only person liable for the continuance of a nuisance created by the alienor.

No counsel appeared for the plaintiff.

RUFFIN, C. J. The Court deems it proper to premise that the rule acted on in assessing damages, as far as it respects the injury to plaintiff's health, is not considered as presented to the revision of this Court. The case is stated with a different view. Possibly the Judge excludes that allegation of the petition from the consideration of the jury because it was not proved; for, while it is stated that evidence was given for the plaintiff on the other parts of his case, the record is silent as to any on this. But, as it is not probable that the mere result of a defect of proof would be so emphatically set out in the verdict and case, it may be supposed that his Honor entertained the opinion that an injury to health by the erection of a mill is not such a private nuisance as can be redressed by an action for damages, or that it cannot be redressed by this peculiar remedy. Whether the opinion, thus supposed, be correct or not, it would be extrajudicial now to pronounce. The record does not contain facts to raise the question. If it did, and such an opinion was given, it was adverse to the plaintiff, and he has submitted to it. For an error, if there be any, in the opinion, the Court would not therefore reverse the judgment of the Superior Court. While that is so, it seems proper to disclaim the sanction of it, which might be inferred from affirming the judgment. The Court does not consider the point at all, and to prevent a possible inference to the contrary is the sole purpose of adverting to it.

The case depends upon the exception of the defendant. Notwithstanding he joined in the issue tendered in the replication, he moved the Court to exclude all evidence on it on the part of the plaintiff. That actually given is not stated. The objection is not, therefore, to the particular evidence, as irrelevant, incompetent or insufficient to prove the issue, but is, in substance, that the issue is itself immaterial,
(224) and that consequently the defendant would be entitled to judgment, notwithstanding a verdict on it against him. The evidence must be deemed proper and to authorize the verdict, if any could be of that character and have that effect. The counsel has so treated the case in the argument, and has contended that there cannot in such a case be a fraud,

legally speaking, and that therefore it cannot be proved or founded upon any evidence.

It is said that the Act of 1715 means to protect the *rights* of creditors, and is satisfied if the party injured is not defeated of all remedy against any person, and that this case cannot be within it because the defendant's alienee becomes responsible, each proprietor being successively liable for the damages in his own time; and so the plaintiff is not without adequate redress.

As subsidiary to these positions, the counsel for the defendant laid down the general proposition that one who erects a nuisance and then aliens the land was not, before the Act of 1809, liable for subsequent damages arising from its continuance; and that our statute clearly restricts this remedy by giving it against the owner or proprietor for the time being. The Court does not consider this case as calling for any construction of the Act of 1809 upon this point, nor deem it necessary to pursue, with the learned counsel, researches into the ancient law upon the first part of the proposition; for, allowing to alienation the operation demanded upon the remedy by *quod permittat* at the common law, or upon the writ of assize, either before or after the Statute of Westm., 2, ch. 24, and yielding to it any effect that may be desired on the action on the case, which, as respects the recovery of damages, has been substituted for the assize, or the like effect upon the petition in our law, yet the alienation supposed must be a real alienation and not a feigned nor a fraudulent one. The general question is not open upon this record, in which it is found that the deed made by the defendant was executed with the intent to defeat the plaintiff of his damages sought to be recovered in this suit.

The case is therefore brought back to the point of the exception, which is whether the deed could have that effect if it stood, or could, in a legal sense, have been (225) made with that intent.

On these questions the Court entertain no doubt. Many cases may be easily conceived in which the deed would prejudice the plaintiff, both as to his rights and his remedies. If the defendant, being liable for the damages in his own time, was insolvent, except as the owner of the mill, and con-

veyed that, voluntarily, the plaintiff would lose his previous damages. The deed may be upon an express or secret trust for the defendant, he continuing in the perception of the profits; or it may have a clause of revocation, and thus be within the words of the Statute 13 Eliz. The alience also may be insolvent, and the conveyance made to him for that reason; for the injury to the plaintiff may be greater than the value of the mill will answer, by the time judgment can be had against the alienee. But we do not think it necessary that the object should be ultimately to defeat the plaintiff entirely of his damages, or any part of them, though that intent is alleged and found in this case. It is sufficient, if the object was to blind him, to put him to a difficulty as to his remedy, so as to delay him of a direct one, and hinder him of that which was most beneficial, and impose costs on him. Such a design would be deceitful and fraudulent. Suppose this deed to have been made secretly and disclosed for the first time in the plea; that it was without consideration, to an infant or to a son, or to one not resident in the State, and that there was no visible change of occupation; and all this to the intent that the plaintiff should not know the owner, but should sue the present defendant, under the belief that he continued to be the owner; and thus be delayed of his remedy against the alienee, and defeated in the action against the alienor. The case, we think, would be clearly within the statute, and the plaintiff have a right to treat the title as if no such deed had ever been made. The case supposed is precisely within that of *Leonard v. Bacon,* Croke Eliz., 234. In Formedon the defendant pleaded *non tenure,* on which the plaintiff took issue. Before suit brought, the tenant had, in fact, enfeoffed several persons of the lands; but it was found that it was to the intent to defraud those who claimed
(226) the land, and that he took the profits. There it might have been argued that the conveyances worked no wrong, and defeated no right; for the feoffees were good tenants to the precipe, and might have been sued. But it was held otherwise, and adjudged for the demandant under the statute of Elizabeth. This must have been upon the ground that the conveyances, although they might not defeat the plaintiff's right, were intended to hinder the remedy

against the feoffor, and to delay him of one against the feoffees.

The Court is not, indeed, aware of any instance in which a conveyance may enure when it is made and received with the intent that it shall enure to hinder or delay a creditor or other claimant of his remedy, as provided by law, directly against him who makes the conveyance, in which it is not avoided, either at common law, upon a general principle of justice, or by force of the statute, in the same manner as if the intention was to defeat the right altogether. In truth, that might be the ultimate effect of such devices; since by successive secret alienation the title would be so passed from one to another that the party could never know whom to sue.

PER CURIAM. Judgment affirmed.

Cited: Gilbert v. Jones, post, 343; *Jones v. Green,* 20 N. C., 491.

MARY HAMILTON v. MORRIS McCARTY.

Upon a covenant to pay sixty dollars annually, for two years, for the hire of a slave, and also to furnish the slave with food, etc., *debt* may be brought before a single justice for one year's hire; and if the warrant call for that sum due by bond, it is well supported by the production of the covenant.

ACTION of DEBT, commenced by warrant before a single magistrate, and carried by successive appeals to the Superior Court, where it was tried at RUTHERFORD, on the last Fall Circuit, before *Martin, J.* The warrant stated it to be a "plea of debt, the sum of sixty dollars, and due by bond." Upon the trial the plaintiff produced and proved a written contract in the words following, to-wit:

"Memorandum of agreement between Mary Hamil- (227) ton of, etc., of the one part, and Morris McCarty of, etc., of the other part, witnesseth: Whereas, the aforesaid Mary Hamilton, for and in consideration of certain sums of money hereinafter specified to be paid her, by the said McCarty, do by these presents hire to the said McCarty a certain negro man named Cupid, for and during the full end and

term of two years next ensuing to commence from the date of these presents, to remain, serve and abide with him until the expiration of the said term, he complying with the articles hereinafter specified; and he, the aforesaid Morris McCarty, on his part, for and in consideration of the services of said negro man Cupid, doth bind and obligate himself to pay unto the said Mary Hamilton, or her assigns, the annual sum of sixty dollars lawful money, to be paid annually; and further to find and provide such negro man with good and sufficient food and drink during said term of two years, and also teach him to the best of his ability the art and trade of boot and shoe making. In testimony whereof the parties aforesaid have hereunto affixed their names and seals, this 1 Sept., 1827.

MARY HAMILTON, [L. S.]
MORRIS MCCARTY. [L. S.]"

"Signed and sealed in presence
CHARLES H. L. SCHIEFLIN."

The defendant's counsel moved to nonsuit the plaintiff upon the ground that the action could not be sustained before a single justice, alleging that it should have been an action of covenant upon the sealed instrument. His Honor refused the motion; and under his instructions the jury returned a verdict for the plaintiff, and the defendant appealed.

No counsel appeared for either party.

DANIEL, J. It seems to us that the plaintiff had her election either to bring an action of covenant in a court of record, or debt before a justice, for sixty dollars. This is not a bond for an entire debt payable by instalments. For rent payable quarterly or otherwise, or for an annuity, or on a stipulation to pay £10 on one day and £10 on another, debt lies (228) on each default. 1 Chitty Pleading, 106. As the plaintiff brought her warrant for an annuity of sixty dollars due by bond, could the specialty which was offered be received as evidence, so as to entitle her to a judgment for that sum? It seems to us that although the plaintiff vouches a specialty, still, when it is produced and discloses stipulations and covenants that the defendant should teach the plain-

tiff's servant a trade in *two* years, and also furnish the slave with meat and drink for *two* years, these covenants (which are not said to be broken) do not enter into the description or substance of the annuity of sixty dollars which the defendant by the bond agreed to pay her annually for two years, and for which she could bring debt so often as the annuity became due. We think that the evidence was admissible, and that the variance between that specialty and the supposed bond mentioned in the warrant is immaterial as to the subject-matter of this suit. The bond shows that the annuity is sixty dollars, and for that sum only is this action of debt brought. We think the judgment should be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Knight v. R. R., 46 N. C., 359.

DEN ex dem. REBECCA W. LUCAS et al. v. THOMAS COBBS.

1. A certificate of commissioners appointed in another State, to take the private examination of a *feme covert*, touching the free and voluntary execution of her deed, which states merely that she "acknowledged the same to be her act and deed *in due form*," is not a compliance with the Act of 1810 (Rev., ch. 791), which requires a certificate of her acknowledgment that she executed the deed freely, and "doth voluntarily assent thereto."

2. An order that a deed of a *feme covert*, with the accompanying commission and certificates, be registered, is not conclusive that all the requirements of the statute have been complied with; and the omission of all or any of them may be shown when the deed is offered in evidence upon any trial.

EJECTMENT for LAND, in Wake County, brought on the joint and several demises of Rebecca W. Lucas and Simon Turner, and submitted to his Honor, *Judge Norwood*, at WAKE, on the last circuit, upon a case agreed, of (229) which the following were the material facts:

Rebecca W. Garland, on 26 June, 1819, being seized in fee by descent from her father, the late David Stone, of the premises described in the declaration, executed, with the assent of John R. Lucas, to whom she was then about to be

married, a deed to Simon Turner and his heirs, for an undivided moiety of the said lands, to the *use* of the said Turner and his heirs, in *trust* for herself, until Hannah Garland, her daughter by a former marriage, should arrive to the age of eighteen years, or should marry, and then in trust for the said Hannah. The consideration for this deed was expressed to be one dollar, and the love and affection which she bore her daughter. Soon afterwards the said Rebecca intermarried with the said John R., and on 12 April, 1822, they being then residents of the county of Brunswick, in Virginia, for and in consideration of $5,000, executed a deed of bargain and sale to Thomas Cobbs, of the city of Raleigh, for all the lands mentioned in the declaration, as well the moiety conveyed to Simon Turner by the deed aforementioned as that retained by the said Rebecca. Attached to the deed to Cobbs, which formed a part of the case, appeared the following commission and certificate: "The Commonwealth of Virginia to Thomas Orgain and Edward B. Hicks, Esquires—Greeting: Whereas, John R. Lucas and Rebecca his wife, by their certain indenture of bargain and sale bearing date 12 April, 1822, have sold and conveyed unto Thomas Cobbs five hundred and twenty-one acres of land with the appurtenances, lying and being in the county of Wake and State of North Carolina; and whereas, the said Rebecca cannot conveniently travel to the said county and State aforesaid, to make acknowledgment of the said conveyance: Therefore, we do give unto you power to receive the acknowledgment which the said Rebecca shall be willing to make before you of the conveyance aforesaid, contained in the said indenture which is hereunto annexed; and we do therefore empower you to receive the acknowledgment of the said Rebecca of the same, and ex-

(230) amine her privily and apart from the said R. Lucas her husband, whether she doth the same freely and voluntarily, without his persuasions or threats, and whether she be willing that the same should be recorded in the State aforesaid according to law. And when you have received her acknowledgment, and examined her as aforesaid, that you distinctly and openly certify the same under your seals, sending the said indenture and this writ. Witness: Robert Turnbull, Clerk of our Superior Court of Law of the

County of Brunswick, in the State of Virginia, this 12 April, 1822. In the 46th year of our foundation.

R. TURNBULL."

"STATE OF VIRGINIA, Brunswick County, to-wit: Pursuant to the foregoing commission to us directed, we did this day examine Rebecca Lucas, privily and apart from her husband, touching her acknowledgment of the indenture mentioned in the foregoing commission, and hereto annexed, and she, said Rebecca, acknowledged the same to be her act and deed in due form. Given under our hands and seals this 28 May, 1822.

EDWD. B. HICKS, [L. S.]
THOS. ORGAIN. [L. S.]"

To the deed was also annexed a certificate of the Governor of Virginia, under the great seal of that State, stating that the Superior Court of Law of Brunswick County was a court of record, and that Robert Turnbull was clerk thereof. The deed, with the commission and certificates attached, was then exhibited to one of the Judges of this State, when the following certificate and order for registration was made: "State of North Carolina, 15 Nov., 1822. The execution of the within deed was then acknowledged before me in due form of law, by J. R. Lucas, the bargainor. Therefore, let it be registered." There was no other order of registration. On the deed there then appeared a certificate of registration in the following words: "The within deed and acknowledgments are all duly registered in the Register's office of Wake County, in the State of North Carolina, in book No. 5, and pages 319 and 320, this 14 December, A. D. 1822." (231)

In July, 1831, John R. Lucas died, leaving the said Rebecca his wife (who is one of the lessors of the plaintiffs) surviving; and in October, 1833, Hannah, the daughter of the said Rebecca, named in the deed to Turner, married. The other lessor of the plaintiff is the trustee in the deed first above mentioned.

The plaintiff insisted that the deed to Cobbs never became the deed of the said Rebecca, for want of any privy examination sufficient in law to give it operation against her. And

also, that if the said deed to Cobbs was valid as the deed of the said Rebecca, yet, that the deed to Turner being also valid in law, the plaintiff was entitled to judgment as lessee of Turner.

The defendants insisted that the deed to Cobbs was valid, and that the deed to Turner, being for consideration of blood only, was voluntary and could not prevail against the purchaser, Cobbs. The parties agreed that if the Court should be of opinion that the plaintiff was entitled to recover, whether as lessee of Turner and Mrs. Lucas or of either of them, either the whole or an undivided part of the premises, then judgment was to be entered accordingly for him with sixpence damages and costs; otherwise, judgment to be for the defendants.

His Honor being of opinion that the plaintiff was entitled to recover the whole land mentioned in the declaration, gave judgment accordingly, from which the defendants appealed.

Devereux, for the defendant.
Badger and *W. H. Haywood, contra.*

DANIEL, J., after stating the case, proceeded: Several questions have been raised by counsel in the argument of this cause. We deem it unnecessary, however, to advert to but one of the points made with respect to the validity of the deed to Cobbs, as we deem that decisive of the case. It is this: Suppose every other objection to the validity of that deed to be removed by the authorities adduced, and arguments made by the defendant's counsel (upon which, by-the-
(232) by, we give no opinion), still the certificate of the private examination and the acknowledgment of the deed by the *feme covert,* before the commissioners, does not find and disclose the very essential and important fact that she executed the deed freely, *and voluntarily assented thereto.* The Act of 1810 (Rev., ch. 791) expressly requires that the Judge or commissioners in another State or Territory shall privately examine the *feme covert,* "whether she doth voluntarily assent thereto, and an attestation of such acknowledgment shall be endorsed on or affixed to said deed or commission, by the Judge or commissioners." What acknowledg-

ment is to be indorsed or affixed? Why, that she acknowledged that she did execute the deed then exhibited to her, when she was privately examined, and furthermore that she acknowledged that she *"voluntarily assented thereto."* The defendant's counsel say that this objection to the validity of the deed is removed by the fact that the commission is in due form, and that *it* directed the commissioners to ascertain whether the *feme covert "voluntarily assented thereto";* and that the certificate of the commissioners is to be taken by the Court, by necessary intendment, to be an affirmative response to that part of the direction contained in the commission; and that the certificate of her acknowledging it to be her act and deed *in due form,* contains, in substance, an allegation that it was done according to law, or to the requirements of the commission. The commission, it is true, is good both in form and substance, provided an order of the court from which it issued had been obtained for issuing the same, and naming the commissioners; but whether such an order ever was obtained does not appear in the case. We do not now mean to give any opinion whether such an order was necessary, or whether the issuing the commission is evidence of an order having been made. Admitting the validity of the commission, this argument is plausible, but we do not think it solid. The deed of a *feme covert* is not like that of an infant, *voidable;* but it is *void.* In pleading she may discharge under *non est factum.*

By the divine, as well as the common, law, the wife is under the power and dominion of her husband; all her acts affecting her rights are therefore presumed (233) to be done under his influence and coercion. The real estate of the wife does not pass to the husband by the marriage. When the husband and wife make a deed to pass her lands, the law presumes that it is done by his authority over her, and without further ceremony it is void. But her real estate is not entirely tied up; she and her husband may convey, when she shall voluntarily assent to convey. To repel the presumption of the husband's influence over her, and to ascertain her free consent, the law requires that she should be privately examined, by persons of great trust and confidence—a Judge or member of some court of record, or by two commissioners, who can explain to her her rights

and protect her in the enjoyment of them; persons who are to certify that she did acknowledge that she executed the deed with her own free and voluntary assent. In the present case the commissioners' certificate, stating that she did acknowledge the same to be her act and deed *in due form,* is too vague and uncertain. We cannot tell what is meant by the words *"due form."* Whether the words "in due form" apply to her having signed, sealed and delivered the deeds, or to having done these things, and also that they were done with her free and voluntary assent, leaves us in uncertainty, doubt and conjecture. The law never intended that *femes covert* should be deprived of their titles to their lands, but upon the most clear and satisfactory proof that they had freely consented to part with the same. Knowing the influence of the husband, the law is careful and watchful to protect them against that influence. When deeds of this description are properly proved, the statute requires that an order should be made by a Judge, or the County Court, that the deed and the accompanying documents should be registered. The commission and certificates are required to be registered, that the Court may at all times see that everything required by law to divest the *feme covert* of her title had been complied with; and also, that the vendee, or those who claim under him, may be always enabled, when they offer the deed in evidence, to show to the Court that the title
(234) had passed from the *feme covert* according to all the requirements of the statute. The order for registration is not conclusive as to these requirements; the omission of all or any of them may be shown when the deed is offered in evidence upon any trial. From the case, as stated, it does not appear to us that Mrs. Lucas freely and voluntarily assented to part with her lands, when she signed, sealed and delivered the deed to the defendant Cobbs, or when she was privately examined. Therefore, the plaintiff as lessee is entitled to recover an undivided moiety upon each of the several demises of Rebecca W. Lucas and Simon Turner. The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Ives v. Sawyer, 20 N. C., 181; *Jones v. Lewis,* 30 N. C., 74.

JAMES MORGAN v. GUILFORD CONE.

1. In detinue, if, after action brought and issue joined, the plaintiff gets possession of the thing sued for, that fact may be pleaded *puis darrien continuance*, in abatement of the suit, but *it seems* that it would not be a good plea in bar.

2. In detinue, damages are only consequential upon the recovery of the thing sued for; and therefore, if the plaintiff, pending the suit, obtains possession of it, he cannot proceed for the damages, but his suit fails altogether.

DETINUE for a slave. Pending the action, after issue joined upon certain pleas, the plaintiff regained possession of the slave. The defendant by plea since the last continuance, insisted upon this in bar of the plaintiff's action, as well for damages for the detention of the slave as for the slave himself. To this plea the plaintiff demurred; and his Honor, *Judge Norwood,* at FRANKLIN, on the last circuit, overruled the demurrer, sustained the plea, and gave a judgment for the defendant for the costs of the suit. Whereupon the plaintiff appealed.

The counsel on both sides waived all objections to the *form* of the pleadings.

Badger, for the plaintiff.
Devereux and *W. H. Haywood,* for the defendant.

GASTON, J. The very imperfect transcript which is filed in this case shows that the plaintiff brought (235) his action of detinue to recover the possession of a negro slave, Green, valued at $600; that the defendant pleaded thereto the general issue and other pleas in bar; that issues were joined; and that at a subsequent term the defendant pleaded that since the last continuance the plaintiff had regained the possession of the slave. To this plea the plaintiff demurred, insisting that he was nevertheless entitled to recover his damages and costs; but the Court overruled the demurrer, and gave judgment that the defendant recover his costs; from which judgment the plaintiff appealed. The record contains no formal declaration, plea, nor judgment; but it is entered of record that the parties on both sides waive all objections, because of form. On so de-

fective a record we might properly refuse to render any judgment; but as the counsel on both sides declare their readiness to put all matters into proper form, we shall proceed to consider and determine the point submitted to us.

When new matter arises after issue joined and before verdict, the defendant, upon verifying such matter, is permitted to plead it in what is called a plea since the last continuance or adjournment of the cause. At common law such a plea confesses the matter which was before in dispute between the parties, and is therefore a waiver of all the pleas previously pleaded. In this State, by the Act of 1796 (Rev., ch. 451), it is enacted that the entering of a plea since the last continuance of a suit in law shall in no case whatever be construed a relinquishment of any plea or pleas previously entered, but the same shall retain the like force and operation which it or they would have had if such plea since the last continuance had not been entered. In consequence of this enactment a plea since the last continuance is a matter of defense additional to those matters already pleaded by the defendant, and does not overrule them, provided that the established order of pleading be not thereby subverted. This seems to be a necessary qualification of a fundamental law of pleading, which holds two pleas of a different order to be incompatible, of which one admits that there is no foundation for the other. The pleading of a plea in abatement since the last continuance necessarily operates a relinquishment of previous pleas in bar.

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We are not satisfied that this would be a good plea in bar. The gravamen in the declaration formally set forth would state that the plaintiff was lawfully possessed of the slave in question as of his own property, and being so possessed, casually lost the same; that it afterwards came to the possession of the defendant by finding, yet the defendant, well knowing the slave to be the property of the plaintiff, hath not delivered it to him, although often requested, but hath hitherto wholly refused so to do, and hath detained and still doth detain the same to his damage, ... dollars. The fact averred in the plea doth not deny to the plaintiff *any* cause of action, for, notwithstanding that fact, he is entitled to compensation for the loss of the services of the slave during the period the possession has been wrongfully withheld. If the writ of the

plaintiff had been in trover, it is clear that the regaining of possession would have affected the *amount* of his claim, but would not have destroyed it.

It seems to us, however, that this is a good plea in *abatement.* The writ of the plaintiff demands the restitution of the slave. The defendant is required to answer of a plea that he render to the plaintiff the specific slave sued for; and the plaintiff afterwards sets forth in his declaration the gravamen hereinbefore recited, as a more full and detailed statement of that demand—as a specification in a methodical and legal form of the facts and circumstances upon which that demand is founded. If the plaintiff succeed in his action, he has judgment to recover the specific slave (or, if it may not be had, the value thereof), and also damages by reason of the detention, if any damages be assessed therefor. The damages are incidental to, and consequential upon, the recovery of the slave. An action of detinue does not lie for damages merely. When a plaintiff brings an action of detinue, and regains possession of the thing detained, he falsifies his writ by his own act, and thereby defeats that action. It is a settled rule that wherever the plaintiff falsifies his own writ, and this appears to the Court, the writ abates.

If a demandant or plaintiff falsify his writ by his (237) own showing or acknowledgment, it abates, of course.

Thus, in an assize against several, *one* pleads a release from the plaintiff, and the plaintiff acknowledges it, the whole writ abates. Or in trespass, the defendant justifies by a warrant for the king's tax, and the plaintiff relies that the place where, etc., was within sanctuary, his writ shall abate, because he acknowledges the taking *by warrant,* and if so, he ought to have replevin, and not trespass. So, if an executor (plaintiff) shows that there is another executor alive, not named, his writ shall abate. Comyn, tit, *Abatement,* L. I., 2. If this do not appear by the plaintiff's own showing or acknowledgment, it is properly pleadable in abatement by the defendant. Thus, the tenant may plead in abatement that the demandant was seized at the day of the *writ purchased.* Comyn, *ut supra,* F., 16. So, if the demandant or plaintiff, after action, usurps that which he claims, his writ shall abate (*id est,* shall be abated on plea of defendant), for he destroys his action by his own act, as if he disseize the tenant pend-

ing an assize. *Idem,* H., 47. So, if the demandant enter pending the writ, and it may be pleaded pending the writ before issue, or after issue since the last continuance. *Ibid.,* H., 48, and 2 Croke, 261. In an assize the plaintiff not only recovers his land, but damages and costs. If, however, he falsify the writ by his own act, he cannot proceed for his damages and costs, but abates the same altogether. The assize is brought for the land, and the damages and costs are a fruit or consequence of the recovery of the thing demanded. Thus it is also in detinue. The thing detained is all that is demanded, and the damages are awarded to render the restitution complete. In either case, if the demandant or plaintiff by his own act destroy the *right* to restitution, there is an end to his *demand* of restitution.

Merritt v. Merritt, 1 N. C., 17, seems to conflict with these views. With every disposition to conform our adjudications to former decisions of the Courts of the State, we cannot rest upon this case as authority. It is known that the com-
(238) piler of this collection never attended Halifax Superior Court where this case is said to have been determined, and it does not appear upon whose relation he stated it. It is possible that it may be an erroneous account of the case of *Merritt v. Warmouth,* 2 N. C., 12, also decided at Halifax, in which case the slave was delivered over, not to the plaintiff, but to a third person, from whom the defendant had hired the slave. If, however, the case of *Merritt v. Merritt* be in truth a different case from the last, the note of it is too vague and unsatisfactory to furnish a safe ground of reliance. It does not appear who constituted the court by which it was determined, nor upon what *points* the decision *rested.* Besides, the decision itself is directly contradicted by that in *Sheppard v. Edwards,* 3 N. C., 186, and in *Stroud v. Wilkes,* not reported, which one of our body personally knows, and where the decision was acquiesced in by the parties and their counsel. We consider ourselves, therefore, not only permitted, but bound to follow upon this question the convictions of our own minds.

As this was a good plea in abatement, the judgment thereon should have been that the plaintiff's writ be quashed, and (as by our Act of 1777 (Rev., ch. 115, sec. 90) in every case where judgment is rendered against the plaintiff, the defend-

ant is entitled to costs) the defendant recover his costs. Regarding the transcript so amended, in pursuance of the agreement of record, we are opinion that there is no error in the judgment below, and that it should be affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Wilson v. Pharr, 47 N. C., 452; *Moore v. Fuller, Id.,* 206; *Puffer v. Lucas,* 101 N. C., 285.

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SAMUEL VINES v. OBEDIENCE BROWNRIGG.

1. If, upon a judgment in detinue for slaves, the execution is satisfied by the payment of the assessed value, by the defendant, and its receipt by the plaintiff, the title to the property will be transferred to the defendant, by relation to the time of the verdict and judgment: and the issue born of said slaves, between the rendition of the judgment and the satisfaction of the execution, will of consequence belong to him.

2. The form and effect of the judgment and execution in *detinue*, stated by DANIEL, J.

ACTION of TROVER, to which the defendant plead *"not guilty."* A case agreed was submitted to his Honor, *Judge Strange,* on the last circuit at GREENE, of which the following are the material facts. The plaintiff had heretofore brought his action of detinue, against the present defendant, for two female slaves, and obtained a verdict and judgment therefor, in which the value of the slaves was assessed. Execution issued on the judgment, and was satisfied by the defendant paying the assessed value, instead of delivering the slaves themselves. Between the rendition of the judgment and the satisfaction of the execution the slaves bore the children, to recover the value of whom was the object of the present suit. The defendant contended that by the satisfaction of the execution in the former recovery, the female slaves and their issue had become her property; but his Honor, being of a different opinion, directed a judgment to be entered for the plaintiff, from which the defendant appealed.

J. H. Bryan and *Mordecai,* for the plaintiff.
W. C. Stanly, for the defendant.

DANIEL, J., after stating the case, proceeded: The judgment in the action of detinue was conditional (*Peters v. Heyward,* Cro. Jac., 682), and if drawn out in form would have run thus: "It is considered by the Court that Samuel Vines do recover against the said Obedience Brownrigg the said slaves, or the sum of .... dollars, for the value of the same, if the said Samuel Vines cannot have again his said slaves; and also, that he recover his said damages, costs and (240) charges to .... dollars beyond the value aforesaid, by the jurors aforesaid, in form aforesaid assessed." In England an *award of distringas* is added at the foot of the judgment on the roll. A *fi. fa.* issued for the damages for the detention of the slaves and costs of suit, at the foot of which *fi. fa.* is added the *distringas,* beginning thus: "We also command you," etc. Archbold Forms, 141. This Court said, in *Brily v. Cherry,* 13 N. C., 2, "that an action of detinue is an affirmance of a continuing title to the thing detained, and that the plaintiff does not, as he does in an action of trover, disaffirm a continuance of title in himself, but may sustain an action for the same chattel against a third person, or even against the same party, although he may have obtained a judgment for it before, provided that judgment has not been satisfied." From this reasoning, and also from the very form of the judgment in detinue, it seems to us that the plaintiff had a right to have the slaves surrendered to him; and that he could have insisted on the sheriff's distraining the lands and goods of the defendant until a surrender should be made, if it was possible for the defendant to have made a surrender. It is very certain that the defendant could have discharged herself from the value mentioned in the *distringas* by making a surrender of the slaves. The slaves were declared by the verdict and judgment to be the property of the plaintiff. It cannot be law that the plaintiff shall, against his will, lose the identical slaves he is seeking to get possession of by the election of the defendant to pay the assessed value, as set forth in the judgment and *distringas.* If the slaves recovered had been specifically delivered to the plaintiff or the sheriff, the plaintiff would also have been entitled

to the issue born before the delivery, as he would to such as might be born afterwards, and might recover such issue in detinue, or the value in trover. The valuation is made and inserted in the judgment and *distringas,* for the benefit of the plaintiff, "if he cannot have again his said slaves," as is declared in the form of the judgment. But the plaintiff's judgment, in his action of detinue, was satisfied by the defendant's paying, and *the plaintiff's receiving,* in money the value of the slaves. The judgment and (241) execution being satisfied in this way, did, in law, transfer to the defendant the title of those slaves, by relation to and from the time that value was fixed by the verdict and judgment. In assessing the value the jury must have taken into their calculation the chances of future increase, and raised the value accordingly. It cannot be just that the plaintiff should receive the value thus assessed, and again recover in this action of trover the value of the after-born children. We think the judgment is erroneous, and ought to be reversed, and that judgment be rendered for the defendant.

PER CURIAM. Judgment reversed.

Cited: Long v. Baugas, 24 N. C., 293; *Cates v. Whitfield,* 53 N. C., 268.

JACOB SMITH v. HENRY TRITT.

1. Growing crops are the proper subjects of a levy and immediate sale under a *fi. fa.;* and the purchaser acquires a right of ingress and egress to cut and carry them away when ripe.

2. A sale under an execution, of a growing crop, made at the distance of two miles from the place where the crop stands, is void, and passes no title to the purchaser.

TROVER, tried on the last circuit, at HAYWOOD, before his Honor, *Judge Settle.*

Upon opening the plaintiff's case, it appeared that in May, 1833, he purchased a growing crop of wheat, oats, and rye, under an execution against the present defendant. The levy upon the crop was made in April preceding, and the sale

took place at the court-house, at the distance of two miles from the premises where the grain was growing. When the grain became ripe, the plaintiff proceeded to the freehold of the defendant, to gather it, but was forbidden to do so by the defendant, who cut and carried it away himself. Upon this statement, his Honor—holding, 1, that the growing crop, although it might be levied upon, could not be sold, until after it was severed from the freehold; 2, that the sale was void, not being made upon the premises—directed a nonsuit, and the plaintiff appealed.

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No counsel appeared for either party.

DANIEL, J. Two questions arise in this case. The first is, whether growing crops are the subjects of levy and immediate sale under a *fieri facias*. Various growing vegetables, termed in law emblements, and properly speaking, the profits of *sown* land, but extended in law, not only to growing crops of corn, but to roots planted, and other annual artificial profit, are deemed personal property, and pass as such to the executor or administrator of the occupier, if he die before he has actually cut, reaped, or gathered the same. All vegetable productions are so classed, when they are raised annually by labor and manure, which are considerations of a personal nature. At common law, *fructus industriales*, as growing corn, and other annual produce which would go to the executor upon death, may be taken in execution. 1 Salk., 368; 1 Younge & Jer., 398; *Lawton v. Lawton*, 3 Atk., 13; *Storer v. Hunter*, 10 E. C. L., 115; Tidd, 9 ed., 1001; 1 Chit. Prac., 92. The appraisement and sale thereof at this day in England is regulated by the statute 56 Geo. III., ch. 50. Where corn sold under a *fi. fa.* is not ripe, the vendee has a reasonable time after it is ripe to cut it and carry it away; and whilst remaining on the land, it is not liable to a distress for rent, for during all that time it is considered in *custodia legis;* the goods in the vendee's possession being protected, in order to render the execution available, although the sheriff's duty ended on the execution of the bill of sale. *Peacock v. Purvis*, 6 E. C. L., 154. Watson on the Duties of Sheriff, 180. In *Stewart v. Doughty*, 9 John., 108, the case was, that whilst the crop was growing, it was

sold by the sheriff under an execution against the lessee, and the plaintiff became the purchaser. The Court said this was a valid sale, and the purchaser became entitled to the right of ingress, etc., to gather the crop. He succeeded to all the interest of the original lessee in the crop sown. And so the law was understood in the case of *Whipple v. Foot,* 2 John., 418. We think the Judge erred in this part of his charge.

The second question is, was the sale by the sheriff of (243) the growing crop under the execution, two miles from the place where the crop stood, a valid sale, so as to pass the title to the plaintiff? The execution is to be done in such a manner as that by the sale the property is most likely to command the highest price in ready money. It is evident that for this purpose the bidders ought to have an opportunity of inspecting the goods and forming an estimate of their value, without which it is not to be expected that a fair equivalent will be bid. The presence of the goods, too, assures the bidders that a delivery will be made to the highest forthwith. There is much justice in the rule requiring the presence of the chattels when they are sold by a sheriff or constable. *Ainsworth v. Greenlee,* 7 N. C., 470; *Blount v. Mitchell,* 1 N. C., 85; *same case,* 3 N. C., 65. In this case the crop was not in the presence of the bidders and, according to the above authorities, we think it was void, and that the purchaser acquired no title. Upon this point in the case we think that the decision of the Superior Court was correct, and therefore the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Brittain v. McKay, 23 N. C., 268; *McNeely v. Hart,* 30 N. C., 494; *Shannon v. Jones,* 34 N. C., 208.

THE GOVERNOR, upon the relation of PHILIP McRAE'S admr., v. JOSIAH EVANS.

1. If the sheriff forbears, at the request of the plaintiff, to collect money on an execution, he is not responsible therefor; but if he forbears of his own accord, he will be liable for the damages the plaintiff may sustain thereby. If the whole amount of the execution is lost by the sheriff's negligence, he will be answerable for that amount; but if the money can still be collected from the defendant in the execution (a fact which it will be for the sheriff to prove), the sheriff will be liable only for the damage which the plaintiff has sustained by the delay.

2. The sheriff is liable for the mere not returning an execution, but the damages therefor will be only nominal.

3. Where the general doctrines and rules contained in a Judge's charge are correct, and there appears no special circumstances requiring a modification of them, and the party excepting has called for no special instructions which have been denied, an exception to the charge cannot be sustained.

After the new trial granted in this case, at June Term, 1830, 13 N. C., 383, it was again tried at Cum-
(244) berland, on the Spring Circuit of 1834, before his Honor, *Judge Seawell,* when it appeared to be an action brought against the surety of the coroner, upon his official bond. The breaches assigned were, that on an execution against the sheriff at the instance of the relator's intestate the coroner had failed to collect the money and to return the execution. Evidence was introduced on the part of the defendant to show that the plaintiff in that execution directed the coroner to forbear making the money, and also to prove that no execution afterwards issued for several subsequent terms, and that during that time the defendant in the execution was of sufficient ability to pay the amount of the execution, if the plaintiff had sued it out. His Honor, in his directions to the jury, informed them "that if the coroner was directed by the plaintiff in the execution not to make the money, the coroner was in no default for his omission to do so; but if the plaintiff did not authorize the coroner to forbear making the money, and he nevertheless did forbear, that the plaintiff would then be entitled to recover damages for the default, and that the amount of damages would depend upon the loss the plaintiff sustained. That if he thereby lost his debt, he would be entitled to

recover the whole amount; but if it was only postponed, and he might have recovered it if he had afterwards taken out another execution, then he was only entitled to recover such damage as was occasioned by the delay. That how the fact was in regard to the reason why the money was not made, whether by the direction of the plaintiff or the mere indulgence of the coroner, was a fact for them to decide, and they would find accordingly. That as to the other breach assigned, it was the duty of the coroner to return the execution to the court from which it issued, but that inasmuch as it was in the power of the plaintiff to have ruled the coroner to return the execution, if such return was necessary, before the Court would allow a new execution, and upon that return to have obtained a new execution, the damage for such omission would be but nominal."

His Honor further instructed the jury: "That it was the duty of the defendant to show the sufficiency (245) of the defendant in the execution to pay, if the plaintiff had taken out new executions, and that it should be fully shown." The jury found for the plaintiff, and assessed nominal damages. The plaintiff moved to have the verdict set aside and a new trial granted on account of misdirection, which being refused, he appealed.

The case was submitted, without argument, by *W. H. Haywood* for the plaintiff, and *Henry* for the defendant.

Gaston, J. This case comes before the Court on the appeal of the plaintiff, and has been submitted to us without argument. On examining the record, we perceive that the plaintiff obtained a verdict but for nominal damages, and moved to have the verdict set aside and a new trial awarded because of misdirection of the Judge in his charge to the jury. This motion was refused, and its rejection is the only error assigned. We have examined that charge, and we do not perceive any instruction in it of which the plaintiff has a right to complain. The general doctrine laid down in the charge is correct, and the rules recommended to the jury as guides to their discretion in the regulation of damages, as general rules, appear to us unexceptionable. If more specific instructions were desired, they should have been prayed

for; and the refusal of the Court to give them made the subject of distinct exception. If there were special circumstances in the case requiring any modification of the general doctrine or of the general rules for estimating the damages, these should have been set forth, for we cannot presume their existence. As the alleged misdirection is not seen, we are of opinion that the Court below did not err in refusing the new trial.

PER CURIAM. Judgment affirmed.

Cited: Buckley v. Hampton, 23 N. C., 322; *S. v. Latham,* 35 N. C., 35; *S. v. Cardwell,* 44 N. C., 249; *Harris v. Harrison,* 78 N. C., 217.

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(246)

EDMUND L. DOZIER, admr. de bonis non of ISAAC DOZIER, v. ISAAC L. SANDERLIN, exr. of WILLIS SANDERLIN.

1. If an administrator marries the next of kin of his intestate, and has assets, and upon the death of his wife, administers upon her estate, her distributive share becomes his property, the claim being by the mere operation of law satisfied and extinguished. And, in such case, *it seems* that the wife's share would become the property of the husband without an administration on her estate.

2. Where an intestate is indebted to the wife of his administrator, and the latter has assets, the debt is satisfied by the mere operation of law, and does not survive to the wife.

ASSUMPSIT, brought by the administrator *de bonis non* of Isaac Dozier against the executor of his former administrator. The jury, upon the issue submitted to them, found a verdict in favor of the plaintiff for the sum of two thousand nine hundred and sixty-nine dollars and forty cents, the amount of assets which had come to the hands of the defendant's testator, subject to certain deductions, if the Court, upon a case agreed, should think the defendant's testator entitled thereto. The case stated that Isaac Dozier died intestate, and Willis Sanderlin, the defendant's testator, administered upon his estate and assets to the amount above mentioned came to his hands. Willis Sanderlin married

Chloe, a daughter of Isaac Dozier. Chloe, after surviving her father, died, and her husband administered upon her estate. Willis Sanderlin then married Patsey Dozier, to whom Isaac Dozier had been guardian, and to whom, at his death, he was indebted as guardian in the sum of six hundred and ninety-seven dollars and seventy-six cents. Willis Sanderlin lived about two years after his marriage with Patsey Dozier, during all which time he had in his hands the amount of assets, above stated, of the estate of Isaac Dozier. The only evidence of his retaining or reducing into possession the sum due his wife from the estate of his intestate was his applying to one George Ferebee, an accountant, to state the accounts between his wife Patsey and Isaac Dozier, her guardian, saying he wished to know how much to retain from the estate of Isaac Dozier.

Patsey survived her husband and was then living, (247) and one of the questions presented to the Court was, whether the sum due the said Patsey from Isaac Dozier belonged to the defendant as executor of Willis Sanderlin, or survived to his wife. The other question was, whether the defendant's testator was entitled, as administrator of his first wife, to her distributive share of her father's estate, which was one-seventh part thereof.

His Honor, *Judge Donnell,* at Camden, on the last circuit, *pro forma,* disallowed both claims made by the defendant on behalf of his testator, and rendered judgment for the whole amount of two thousand nine hundred and sixty-nine dollars and forty cents, from which the defendant appealed.

Kinney, for the defendant. If a husband reduces his wife's chose in action into possession during coverture, he is entitled to it as his own at law. Here he had it in possession during the marriage, and manifested a determination to keep it *jure marito.* Whenever a debt is due to an administrator from the estate upon which he has administered, and he has assets in his hands, the assets to an amount sufficient to extinguish the debt become his own, as the law appropriates them to that purpose. *Muse v. Sawyer,* 4 N. C., 637; 1 Rolle Abr., 350. By marriage, the husband is appointed by the wife to receive her choses in action. He is therefore

in this case both payer and receiver, and the law makes the application.

Bailey and *Iredell,* for the plaintiff. Choses in action, to become the property of the husband, must be reduced into his possession as husband. Here he held as trustee, and no act was done showing a reduction into possession in his own right. An intent only to reduce into possession will not do. 1 Roper Husband and Wife, 204; *Blount v. Bestland,* 5 Ves. Jun., 515. A mere appropriation is not sufficient. *Wildman v. Wildman,* 9 Ves. Jun., 174; 1 Roper Husband and Wife, 216. A husband's receipt of his wife's choses in action must be in the character of husband. *Baker v. Hall,* 12 Ves. Jun., 473; *Berry v. McAlister,* 1 N. C., 318. If a husband takes property in the character of a trustee, (248) and shows no act to evidence his taking it as husband, it survives to the wife. Merely calling upon an accountant to state an account is not a sufficient act. A debt to be extinguished must be owing from the person who is alone to receive it for his own use and not for the use of another.

Kinney, in reply. Where a man is to receive money from a particular fund, and the fund is in his hands, the law makes the application and discharges the debt. Can a debt due the wife be paid to any person but the husband? Can the wife give a receipt and discharge for the debt? A court of law will make the application of the fund, though a court of equity may hold the husband as a trustee for the wife.

RUFFIN, C. J. It is yielded on the part of the plaintiff that the testator, Willis Sanderlin, by administering on the estate of his first wife, Chloe, became entitled to her distributive share of her father's estate, and might retain it out of the assets of the father, then in his own hands as administrator of the father. Whether the administration on the wife's estate was necessary might be doubted, supposing the husband to have assented to the distribution; and there is no dispute here whether he held the assets for distribution or for the benefit of his intestate the father's creditors. Having the assets, he was himself the debtor to the father's next of kin; and whether the debt to his wife became extinct because as husband he might retain it, or not, it seems cer-

tain that by administering on her estate, which enured to his own benefit, and thereby becoming himself the sole creditor, and being before the sole debtor, the debt was satisfied and extinguished.

It is insisted, however, that the debt to Patsey, the second wife, was never reduced to possession by the husband in his lifetime, and therefore survived to her. The argument is, that he did not hold as husband, but had the assets as administrator and trustee; and several cases were cited where the executor married the residuary legatee, and it was held that it was not *per se* a reduction to possession (249) by him. But those cases seem to have no application to that before us. They involved the consideration of the executor's assent to the legacy, until which he could not be said to hold either as legatee or husband. Here the husband's intestate had been the former guardian of the wife, and was indebted to her at his death. It is not seen how this differs from any other debt. If the intestate had owed the wife a bond debt, and the husband administered on the debtor's estate and received assets sufficient, he might or ought to apply them to the debt, because as husband he has the right to retain, and as the administrator having assets he is the hand to pay. It is clear that the husband may retain for a debt due to his wife from his intestate. Indeed, it is stated that if a married woman be executrix, the husband may retain if the testator was indebted to him or (which is said to be the same thing) to the wife before marriage. Toll. Exrs., 359. It cannot be otherwise, for the case is within the reason of the rule of retainer. Whether the debt be due to the husband or to the wife, and whether the one or the other be the representative, can make no difference, for in neither case could a suit be brought, and therefore the remedy is by retainer. When a retainer is allowed, and the party has assets, it is an extinguishment, upon the principle that the same hand is both to pay and to receive. *Muse v. Sawyer,* 4 N. C., 637.

The Court does not think it necessary to consider the effect of the marriage merely, nor of the evidence of the intention of the husband to appropriate a part of the assets to the debt, nor how the rule is where the husband is the executor and the wife a legatee. The case is decided on the whole of its own

circumstances, which are that an administrator of a debtor with ample assets marries the creditor. We think the law immediately applied so much of the assets in satisfaction. Consequently, upon the case agreed, both of those sums are to be deducted from the verdict, and the judgment must be reversed and judgment rendered here for the plaintiff for one thousand nine hundred and forty-seven dollars and twelve cents.

PER CURIAM. Judgment accordingly.

Cited: Ruffin v. Harrison, 81 N. C., 216.

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(250)

THOMAS E. PENDER v. ALPHEUS FOBES.

Where, upon the sale of a vessel, a bill of sale was executed between the parties, containing a warranty of title only, parol evidence is inadmissible to prove an additional warranty of soundness.

ASSUMPSIT upon an alleged parol warranty of soundness in the sale of a vessel. A bill of sale, under seal, was executed by the defendant for the vessel in question, containing only a covenant of warranty as to the title. The plaintiff proposed to prove by a witness that at the time the contract was made and the bill of sale executed, the defendant warranted the soundness and seaworthiness of the vessel. The evidence was objected to on the part of the defendant, and his Honor, *Judge Donnell,* at CHOWAN, on the last circuit, deeming parol evidence inadmissible to establish an additional warranty, when the parties had reduced their contract to writing by a formal bill of sale containing only covenants of warranty of title, rejected the evidence. The plaintiff, in submission to this opinion, suffered a nonsuit and appealed.

The case was submitted, without argument, by *Iredell* for the plaintiff, and *Kinney* for the defendant.

DANIEL, J. An oral contract, agreeing with that stated in the declarations, may be proved by any competent witness who

was present at the time or who heard the defendant admit the existence of such contract. In two classes of cases, however, parol evidence is inadmissible: First, where the parties have entered into a written contract, for that is the best and only evidence of the intention of the parties, so long as it exists, that can be produced. Secondly, where written evidence of the contract is expressly required by law. 2 Starkie, 81. It is a general rule that where an agreement has been reduced to writing, evidence of oral declarations made at the same time shall not be admitted to contradict or to alter it; for where the terms of an agreement are reduced to writing, the document itself, being constituted by the parties themselves as the true and proper expositor of their ad- (251) missions and intentions, is the only instrument of evidence in respect of that agreement which the law will recognize, so long as it exists, for the purposes of evidence. 3 Starkie, 1002. Where a contract was entered into for the sale of goods, and a bill of sale was afterwards executed, it was held that the bill of sale was the only evidence of the contract which could be received. *Lano v. Neale,* 3 E. C. L., 267. The previous contract there was for a ship, forty tons of iron kintlage, etc. The bill of sale was of a ship, together with all stores, etc., in the usual form, and silent as to kintlage, and held that the vendee could not recover for the nondelivery of the kintlage. So, where the agreement specified the rent and the term, but was silent as to the taxes, the Court refused to receive parol evidence on the part of the lessor that previously to the drawing up of the memorandum it had been agreed and understood by the parties that the rent was to be paid, clear of all taxes. *Rich v. Jackson,* 4 Bro. Ch. C., 515. The same rule in the cases of *Preston v. Merceau,* 2 Will. Bla., 1249, and *Rolleston v. Hibbert,* 3 Term, 413. Again, parol evidence was refused to the plaintiff to prove a warranty of the soundness of a slave, when there was a written instrument conveying the slave and containing a warranty of title only. *Smith v. Williams,* 1 N. C., 25; s. c., 5 N. C., 426. For, say the Court, if they meant to be bound by any such warranty, they might have added it to the writing and thus have given to it a clearness, a force and a distinctness which it could not have by being trusted to the memory of a witness.

We think that the decision made by the Judge in the Superior Court was correct, and therefore the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Daughtry v. Boothe, 49 N. C., 88; *Hilliard v. Railroad,* 51 N. C., 343; *Sparks v. Messick,* 65 N. C., 442.

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(252)

ALEXANDER TROY et al., exrs. of JAMES B. WHITE, v. JOSHUA WILLIAMSON.

Under the Act of 1782 (Rev., ch. 177, sec. 3), the sheriff must be proceeded against by *sci. fa. as bail,* for not taking bail upon a *capias,* in equity; and an action on the case will not lie against him for such failure or neglect.

CASE against the defendant, as sheriff, for not having taken bail upon a *capias ad respondendum*, issued on the filing of a bill in equity. His Honor, *Judge Seawell,* at COLUMBUS, on the last circuit, being of opinion that the Act of 1782 (Rev., ch. 177, sec. 3), which authorizes a *capias ad respondendum* in equity, not only imposes the same liability on the sheriff for not taking bail, but gives the same remedy as in cases at law, nonsuited the plaintiffs, whereupon they appealed.

Winston, for the defendant.

No counsel appeared for the plaintiffs.

DANIEL, J. The Act of 1782 (*ubi supra*) authorizes the Judge to make a special order to hold the defendant to bail, either in term-time or in vacation, upon the plaintiff's filing his bill and making oath as to the amount of his debt, or damages incurred by the conduct of the defendant. The clerk, upon such order, is to issue a *capias ad respondendum* to the sheriff of the county where the defendant resides. By the Act of 1789 (Rev., ch. 314, sec. 5) the clerk and master may make the order and issue the *capias.* The sheriff is directed to obey the same. And the same rules and regulations shall be observed in regard to bonds taken by virtue of

this act, and they shall be on the same footing in all respects as bail bonds taken by the sheriff on actions at law, except they shall be assignable by the sheriff, or his representatives, under the directions of the Court, and the sheriff is to be held liable for taking *insufficient security* as in such cases in actions at law. By the Act of 1777 (*ubi supra*), in civil actions, if the sheriff fail or neglect to take bail, or the bail returned be held insufficient, on exception taken to the same the sheriff shall be deemed and stand as special bail. Under this act the sheriff is to be proceeded against, (253) not by an action on the case for neglect of duty, but by *scire facias* charging him as bail, when he shall have all the privileges and advantages of bail in general. *Huggins v. Fonville,* 14 N. C., 392. If the sheriff takes a bond by force of the Act of 1782, it is placed on the footing of a bail bond, and the securities have all the rights and privileges of bail on actions at law. So the act declares that if the sheriff shall take *insufficient security* he shall be held liable as in actions at law. This act is not as particular in its phraseology as the Act of 1777. It does not in so many words declare that if the sheriff shall *fail* or *neglect* to take any bail he shall himself be deemed and taken to stand as special bail, but if he shall take *insufficient security* he shall be held as bail. It seems to us, however, that the Legislature meant to place the liability of the sheriff for taking insufficient security, or no security, precisely upon the same footing under both acts, and that his not taking *any security* is tantamount to his not taking *sufficient security.* The law intended that he should get good bail or be bail himself. We think, therefore, that the sheriff in this case must be considered as bail, and that the plaintiff must proceed against him in that character. This action has been misconceived, and the judgment below must be affirmed.

PER CURIAM. Judgment affirmed.

It seems that the same doubts which caused this case to be brought to the Supreme Court for adjudication induced the Legislature, at its session in 1833, to pass an act (see pamphlet, Acts of 1833, ch. 7) amendatory of the Act of 1782, declaring that sheriffs shall be held and taken as special bail

for failing or neglecting to take bail upon a *capias ad respondendum* from a court of equity, as they were by the particular words of the Act of 1782 for taking insufficient bail. The neglect of duty for which the sheriff was sued in this case took place before the passage of the Act of 1833, and therefore did not come under its operation. This note is inserted for the purpose of explaining the reason why the Court was under the necessity of putting a construc-
(254) tion upon the Act of 1782, as it would have been relieved from that necessity had this case come within the operation of the Act of 1833.

LEMUEL M. PETTIJOHN, exr. of VALENTINE BEASLEY, v. ROBERT BEASLEY et ux.

1. A widow, whose husband has left a will, to entitle herself to a year's provision under the Act of 1827, ch. 13, must enter her dissent to the will, and file her petition at the term of the County Court when it is proved.

2. A County Court, having *no power* to make a year's allowance to a widow, when her petition is filed at a term subsequent to that at which the will was proved, may, on motion, set aside the proceedings granting such allowance, although the executor may also be relieved by *certiorari*.

RULE to show cause why the report, and confirmation thereof, of an allowance to a widow for her year's support, should not be set aside as irregular and void.

Harriet Beasley, the widow of Valentine Beasley, filed her petition at March Term, 1834, of CHOWAN County Court, in which she stated that her husband had died leaving a will, to which she had entered her dissent of record at that term; and, further, that said will had been proven at the preceding November Term of said Court by Lemuel M. Pettijohn. The petition prayed that commissioners might be appointed to allot to her one year's provision out of the estate of her said husband, which was granted; and the commissioners made their report to the ensuing term in May, when it was confirmed by the Court. At the August Term following, this rule was obtained against the said Harriet and Robert Beas-

ley, whom she had married since filing her petition. Upon the return of the rule it was made absolute, and the defendants appealed to the Superior Court, where, at Chowan, on the last circuit, his Honor, *Judge Donnell,* dismissed the rule and proceedings thereon, being of opinion that if there was error in the proceedings on the application of the widow for her year's support, it could only be reached by *certiorari* or writ of error. From this judgment the (255) plaintiff appealed.

No counsel appeared for either party.

GASTON, J. In the case of *Gillespie v. Hymans,* 15 N. C., 119, it was determined that a widow whose husband died intestate could not claim a year's provision out of his estate unless her petition was filed at the term when administration was granted. The Court left open the question, at what time a widow who *dissents* from her husband's will, and who, it is declared by our Act of 1827, ch. 13, "shall be entitled to and shall recover out of the estate of her husband one year's provision *in the same manner* that she would have done if her husband had died intestate," is bound to prefer her petition. The record in this case shows that the widow preferred her petition at March Term, 1834, of Chowan County Court, and by her petition set forth that her husband's will was proved at the preceding term, and that at the term of filing the petition she dissented therefrom. If we take the *words* only of the Act of 1827, there is no limitation to the time when the widow who dissents shall demand her year's provision. She shall recover it in like manner as she would have done if her husband had died intestate; and when her husband dies intestate she is to petition at the same court when *letters of administration* are granted. Unable by any construction to adhere to the *words* of the Act of 1827, we are driven to the necessity of fixing such an interpretation upon the act as seems most consistent with the general intention of the Legislature.

The practice of dissent by a widow from the will of her husband was introduced by our Act of 1784 (Rev., ch. 204, sec. 8). Before that act widows were entitled to be endowed of one-third of all the lands whereof their husbands were

seized at any time during the coverture, and no provision made for a widow by will, unless made in lieu and satisfaction of dower, and then because of her election to take it as such constituted a legal bar to the demand for dower. Among very important changes made by that act, the widow's
(256) claim to dower was restricted to the lands whereof her husband died seized, and a *testamentary* disposition made in her favor by her deceased husband was a legal *bar* to dower, unless she signified her dissent thereto before a Judge or in open court of the county within six months after probate of his will. The first act of our Legislature in relation to the year's provision for the widow was made in 1896 (Rev., ch. 469), and none of the acts on the subject (unless that in question be one) have any reference to or necessary connection with those relative to dower. *This* act, in speaking of *dissents*, unquestionably means dissents signified in open court or before a Judge, as required by the Act of 1784. So far the latter act is necessarily referred to. But the Act of 1827 goes on to provide that the widow so dissenting shall be entitled to and recover a year's provision in the same manner as if her husband had died intestate. The widow of an intestate is not entitled and cannot recover unless she prefer her petition *at least* as soon as a representative of that estate is appointed and qualified. We have had occasion to notice, in *Gillespie v. Hymans,* the manifest design of the Legislature to secure this provision as the means of subsistence to the widow during the first year of her destitution, and their solicitude that it shall be made before the representative of the estate of the deceased shall enter upon the administration of the assets. We cannot presume that it was intended to place the widow dissenting in a better situation than the widow of an intestate, or to subject the executor to difficulties and embarrassments from which the administrator was so sedulously protected. We are therefore led to the conclusion that to entitle the widow, when her husband has left a will, to claim a year's allowance, she must dissent and petition at the term when the will is proved.

There is no doubt but that a *certiorari* would have been an appropriate remedy for the plaintiff in this case against the illegal allowance made to the widow. But where the unlawful act is absolutely void (according to the case of

Whitley v. Black, 9 N. C., 179) the court in which it takes place may, on motion, declare the act void. Such appears to us the character of the act done in the pres- (257) ent case. The County Court had *no power* to make the year's allowance upon the petition exhibited, and upon discovering that it had unwittingly transcended its power it might rightfully order a *vacatur* to be entered of its proceedings.

This Court reverses the judgment of the Superior Court and affirms that of the County Court setting aside the report and confirmation thereof on the petition of Harriet Beasley.

PER CURIAM. Judgment reversed.

NICHOLAS NICELAR v. THE HEIRS OF LEONARD BARBRICK.

The report of commissioners, appointed to divide the lands of intestates, under the Acts of 1787 and 1801 (Rev., chs. 274 and 588), will be presumed to be correct, and be confirmed, although one dividend of *land* be nearly double and another not half of the average value of the shares, unless something improper appears on the face of the return, or is shown by extrinsic proofs.

PARTITION. The heirs at law of Leonard Barbrick filed a petition for partition of the lands of their deceased ancestor in the County Court of CABARRUS, an order was made for the appointment of commissioners, and the commissioners made return of their proceedings to the Court. It appeared upon that return that they had allotted to Catharine Stirewalt, one of the heirs and wife of Adam Stirewalt, by metes and bounds, a piece of land containing two hundred and twenty-one acres, valued at eleven hundred dollars; to Polly West, another of the heirs, the wife of Isaac West, an adjoining piece of land, by metes and bounds containing two hundred and twenty-six acres and valued at three hundred and ninety-five dollars; to Margaret Earnhart, another heir, the wife of Peter Earnhart, an adjoining piece, by metes and bounds containing two hundred and fifty-seven acres and valued at five hundred and fourteen dollars; and to Elizabeth, the wife of Nicholas Nicelar, the other heir, a piece by metes and bounds containing two hundred and eighty-four acres

(258) and valued at one thousand eight hundred dollars; and for equality of partition they charged the share of Elizabeth Nicelar with the sum of eight hundred and forty-seven dollars and seventy-five cents—that is to say, with four hundred and thirty-eight dollars and twenty-five cents payable to Margaret Earnhart, and four hundred and nine dollars and fifty cents to Polly West; and the share of Catharine Stirewalt with the sum of one hundred and forty-seven dollars and seventy-five cents, payable to Polly West. The County Court confirmed this report and ordered the same to be recorded, from which judgment Nicholas Nicelar appealed to the Superior Court. In that Court, on the last Circuit at Cabarrus, before his Honor, *Judge Settle,* it was objected by the appellant, that the report ought not to be confirmed, because of the inequality in the partition, appearing on the face of the report; but this objection was overruled, and "the report confirmed," from which judgment he appealed.

No counsel appeared for either party.

GASTON, J., after stating the case as above, proceeded: The Acts of 1787 and 1801 (Rev., ch. 274 and 588), requires that the commissioners shall apportion the lands into as equal shares as possible, by a subdivision, if necessary, of the more valuable tract or tracts; and authorize an unequal partition of the lands, and correcting the inequality by charges of money on the more valuable dividends, only, where an equal division of the lands cannot be made without injury to the heirs. These requirements are to be strictly observed by the commissioners, and every departure from them ought to be corrected wherever it is perceived. A disregard of them compels some of the parties to become sellers and others purchasers, without their consent, and, especially in the cases of *femes covert* and infants, *may* be productive of very injurious results. The inequality in the value of the different tracts in this case, is very striking. The average value of a share is nine hundred and fifty-two dollars and twenty-five cents, and to one of the parties is allotted land of
(259) almost double this average value, and to another, land less than half this value; nor are any special circum-

stances stated which rendered it impracticable to make a more equal division without injury to the heirs. Nevertheless it appears to us that so much respect is due to the report of the commissioners selected for, and sworn to, the performance of this special duty, as to warrant the presumption that their doings have been correct, where the contrary does not appear upon the face of their return or is shown by extrinsic proofs. It may be that a more equal division of the lands could not have been made without injury to the parties, and therefore the partition cannot be pronounced wrong upon its face. No extrinsic proofs were offered to contradict the presumption of correctness. This Court, therefore, cannot say that the Superior Court erred in overruling the only objection made to the report and in confirming the same.

We have had some doubt whether the judgment below is to be regarded as a final one or not. From the great indulgence which has been shown in this State to informal entries, possibly this might be supported as such. We do not, however, consider ourselves bound to treat it as a final judgment, and we think, had a final judgment been designed, the return and appropriation would have been directed to be recorded (or enrolled) and a disposition made of the costs of the appeal. Viewing the judgment as interlocutory only, from which an appeal has been permitted under the Act of 1831, ch. 34, we shall direct this opinion to be certified to the Superior Court of Cabarrus, and there is to be a judgment here against the appellant for the costs of this appeal.

PER CURIAM. Judgment accordingly.

Cited: Simmons v. Foscue, 81 N. C., 91.

APPENDIX.

(260)

*JOSHUA WHITE, admr. of JACOB WHITE, v. JOHN C. WHITE.

1. A deed conveying slaves to the trustees of a religious society, for the use of the society, vests no beneficial interest in the trustees individually; and if it is intended to confer on the slaves the rights of freemen, while they are nominally held in bondage, it is inoperative as being against public policy.

2. The possession of slaves for more than three years, by the trustees of a religious society, for its benefit exclusively, and against the rights of all others, is a bar to an action of detinue for the slaves, notwithstanding the society considers slavery as sinful, and holds the slaves for the purpose of giving them the advantages of freemen; because the cause of action arose from the conversion, and not from the intent with which it was made.

DETINUE for several slaves. PLEAS *non detinet* and the statute of limitations.

On the trial before his Honor, *Judge Seawell*, at GATES, on the Fall Circuit of 1833, the case was as follows:

Joshua White the elder, being the owner of a slave named Hagar, the mother of those in dispute, in the year 1776, executed the following deed:

"I, Joshua White, of, etc., from mature and deliberate consideration and conviction of my own mind, being fully persuaded that freedom is the natural right of all mankind, and that no law, moral or divine, has given me a right or property in the persons of any of my fellow-creatures; and being desirous of fulfilling the injunctions of our Lord and Savior, by doing to others as I would be done by, do therefore declare that, having under my care a negro girl by the name of Hagar, aged about ten years, I do for myself, my heirs, executors and administrators, hereby release unto the said Hagar all my right, interest and claim or pretentions of claim to her person, or any estate which she may acquire, after she shall attain to the age of eighteen."

There was no evidence offered of any seizure of the slave by the churchwardens or any other person, pursuant to
(261) the Act of 1741 (Iredell's Rev., ch. 24, sec. 56). Joshua White sent the slave Hagar to his son Jacob

*This case was decided at December Term, 1833, and is one of the four cases reported in 15 N. C., commencing at page 257, in which the same party was plaintiff, but by some mistake, the opinion of the Chief Justice was overlooked.

White, with whom she and her children lived many years. During Jacob's possession of them he frequently declared that he had no title to them, but kept them only in consequence of a promise made by him to his father. While the negroes were in the possession of Jacob, they refused to labor on his plantation, upon which, on one occasion, he told an uncle of his to take them, and do what he pleased with them. Afterwards, in March, 1809, he executed the following deed:

"Know all men, etc., that I, Jacob White, of, etc., in consideration of the love and affection I have and bear towards the Society of Friends, or people denominated Quakers, and for divers good causes, etc., have given, granted, assigned and set over to Mordecai Morris, Joshua Trublood, and others, trustees for the said society, to and for the benefit of the said society, all my right, title, interest and claim in certain negroes" (describing them, and among whom were Hagar and her children), "to have and to hold the said negroes to them and their successors in office, to the care and protection of the said society."

After the execution of this deed the negroes remained in the possession of Jacob White, with the consent of the trustees, until his death in 1816, and after his death, in that of his widow, until her death in 1823.

Joshua White the elder, the maker of the deed of emancipation above set forth, by his will, devised to his son Jacob a tract of land, and then proceeded as follows: "also every other article that I have already possessed him with." He gave the residue of his estate to his wife and three daughters, and constituted his wife and one Moore executors. The will was proved in January, 1804, by both the executors.

Jacob White by his will gave the residue of his estate to three of his children, of whom the plaintiff is one. He appointed his wife and his son Josiah, executors, and the will was proved by the latter alone. No slaves were mentioned in Jacob's will, and after the execution of it he frequently declared that he did not own any.

At November Term, 1831, of the County Court of Perquimans, where Jacob White resided at the time (262) of his death, the plaintiff sued out letters of administration on his estate, which recited "that Jacob White of this county died some time in the year 1816; that he made his

last will and testament, which was duly proved in the said County Court, and therein appointed his wife Mariane White and his son Josiah White, executors of his said will, both of whom are since dead; and Joshua White having prayed to be appointed administrator on the estate of the said Jacob with the will annexed, and he having entered into bond with approved sureties and qualified according to law. These are therefore to authorize and empower the said administrator to enter into and upon all and singular the goods and chattels, rights and credits of the said deceased, to pay his debts," etc.

In the year 1820, after the death of Josiah White, the acting executor of Jacob, the plaintiff claimed these negroes from one of the trustees of the society, who had succeeded Morris and Trublood, but he refused to surrender them, insisting upon his title as trustee. This claim was repeated with similar results in 1824, and again in 1831, after the suing out the letters of administration above set forth. In 1827 a general agent of the society hired out all the slaves belonging to it, and among them those in dispute. The principles of the society in respect to slavery were proved and made part of the case. Of them it is sufficient to say that they deny its morality, but submitting to the laws, they hold their slaves as property, claiming a dominion over them, but exercising that dominion for the benefit of the slaves, and for the promotion of individual cases of emancipation.

Upon this case it was contended for the defendant:

1. That the letters of administration were void, because the grant was general, and not of the goods unadministered.

2. That the deed of 1776 divested the title of Joshua White the elder, by either emancipating the mother or by leaving her as derelict.

3. That the slaves did not pass to Jacob White by (263) the will of his father, because they were not within the meaning of the words "article with which I have possessed him," and because there was no evidence of an assent by his executors.

4. That by the deed of Jacob White to Morris and Trublood, his title, if he had any, was divested, the trustees taking either for their own benefit or for that of the society.

5. That the action was barred by the statute of limitations.

His Honor ruled that the letters of administration were sufficient to enable the plaintiff to recover if Jacob White had title; that the deed of 1776 was inoperative, there never having been a seizure for the forfeiture, and the slave being incapable of taking under it; that the deed to Morris and Trublood was inoperative, being against public policy, if it intended to give the slaves the privileges of freemen, while nominally in bondage; that the statute of limitations was not a bar, if the trustees did not hold upon their own title as owners. And leaving to the jury the inquiry of fact, whether the slaves had been placed in the possession of Jacob by his father, his Honor instructed them that if they were, they passed by his will to Jacob, and that they were at liberty to infer an assent to the legacy to him from the length of time he had the slaves in possession.

A verdict was returned for the plaintiff, and the defendant appealed.

Badger, Mendenhall and *Kinney,* for the defendant.
Iredell, for the plaintiff.

RUFFIN, C. J. The first objection taken to the plaintiff's recovery, and to the instructions of the Judge who tried the cause, is founded upon the deed made by the plaintiff's intestate to the trustees of the Society of Friends, which is set forth at large in the record. It purports, in consideration of affection for the society, and other good causes and considerations, to convey and grant "unto Mordecai Morris, Joshua Trublood, and *others, trustees for said society,* to and for the use of the said society," the several slaves in controversy, besides others. The Court stated to the jury (264) that if the object of this deed was to afford to the slaves the privileges and enjoyments of freemen, whilst they were to be held only nominally as slaves, it was void in law, as being against the public policy.

The counsel for the defendant admits that, as trustees, Morris and Trublood cannot take the slaves with the intent supposed by the Judge, because they can, in that character, take such things only as are to be held for the benefit of the society. But it is contended that the trustees have individually a capacity to take, and that the title vested in them as

individuals, upon the principle that the deed shall operate in some way to make it effectual.

That principle is resorted to in favor of the intention of the parties, *ut res magis valeat quam pereat.* The rule of construction is the intention, as well of deeds as of wills, and there is a presumed intention that every instrument shall have the effect to pass the property mentioned in it, between the parties to it, and in the characters therein given to them. But, if, from the nature of the conveyance, it cannot operate at all according to its obvious import, it shall do so in any other which its terms will allow, and which is not inconsistent with the principal intention, as collected from the deed itself. Hence, a deed which is in form a feoffment or release, may be good as a bargain and sale, or a covenant to stand seized. But that reason is not applicable to the case under consideration. This deed upon its face may operate to convey the slaves to the trustees, as trustees, and does so operate, for aught that appears upon its face. It purports to be for the use and benefit of the society, and there is nothing to restrain a donation of slaves, more than other property, to the use of a religious society. The deed, apparently, then, vests the estate in the grantees officially, which is the expressed intention of it. As a conveyance of that sort it is avoided by matter *dehors,* namely, that the property was not for the use of the society, as expressed. The question then arises, whether a new operation, which is against both the words and the intention declared in the deed, can (265) be given to it, so as to vest the title for the beneficial use of the grantees. We think not; for the reason why the deed in its natural sense is not valid is, that the real purpose was a fraud upon the law, and that furnishes no ground for enabling the trustees to commit a further fraud on the society and the former owner. This is not like the case of *Stephens v. Ely,* 16 N. C., 493; for there the grantee had only a natural capacity. Here the trustees have a *quasi* corporate capacity, as their successors are to take; but they have no corporate name, and therefore, of necessity, a conveyance must be to them in their proper names, adding their official (if I may so call it) designation, so as to show the character in which they take. Nor is it like the office bonds given to the Justices of the County Courts. They

may operate at common law, because there is nothing unlawful in taking a bond to the justices in either capacity. But here the law forbids the purpose of this deed, whoever may be the grantee; and if it cannot, for either reason, be effectual to the parties as trustees, the same reason must prevent the Court from making the deed, by construction, a deed to the individuals.

It is further objected that the letters of administration to the plaintiff are void because they do not purport to be *de bonis non.* It is true, they are not expressly so, but they recite the appointment of executors in the will, the probate of the will, and the death of the executors; so that, substantially, they are of the character which it is insisted they ought to be in point of form. Although it might have been more regular to have given them that special form, yet it is only an irregularity, we think, which does not avoid them, but renders them voidable; and until repealed, they give to the plaintiff her rights of administrator.

Another question, of much importance and not a little difficulty, has been made upon the effect of the deed of emancipation, made by old Mr. Joshua White, in December, 1776. On the part of the plaintiff it has been contended that it was merely void for the want of capacity in the slave to take, and because it was forbidden by the Act of 1741. While for the defendant it is contended that the mas- (266) ter may renounce his ownership, and that the slave, being a reasonable being, thereby acquires the same relation to society that any other person has, and that the statutes do not restrain the acts of the master, in reference to his own rights or interests, but only in respect to the public interest, and therefore, that the act of manumission is not void, but produces a forfeiture. If the slave be forfeited, the plaintiff has no right. In the Superior Court it was held that the deed was void; or that no seizure was made by the churchwardens or the sheriff; the property of the former owner remained. Upon consideration of the Act of 1741, it seems to the whole Court that a deed of emancipation did operate to extinguish immediately all the rights and powers of the master since the slave was declared to be absolutely free, in case he left longer than a certain time. If the slave did not go away, or returned, the churchwardens were to seize and sell it absolutely, without any power re-

served to the master to reclaim the slave under any circumstances. The construction is a necessary one, that no ownership under any qualification remained in the master, and consequently, that either an immediate forfeiture to the State took place by way of punishment to the owner and slave for the nuisance, or the property, being derelict, vested in the sovereign, and was subject to such disposition as the legislative authority prescribed. The doubt upon this part of the case arises out of the terms of the deed of 1776, which purports to renounce the interests and "pretensions of claims" to the slave, not immediately, but eight years afterwards, at her arrival at the age of eighteen. There would be no hesitation in treating such an instrument as an act of unequivocal emancipation, with a reservation of service for a period as an apprentice or indented servant, in a country where emancipation was encouraged, or even tolerated. Much slighter matters, as making a contract with the slave, or suing him, have been, in favor of liberty, caught at, as being *per se* manumissions, because inconsistent with the state of servitude. But emancipation was not favored in the province, and only allowed under circumstances; and if this
(267) deed be construed as conferring it immediately, the necessary consequences of it would be an immediate forfeiture. For by the deed the servant was restrained from compliance with the statute, by leaving the province within six months, and unless she remained, the property of White was subject to sale by the wardens. We think a court would have hesitated to put such a construction on it, merely for the sake of the forfeiture, before the expiration of the time of service specified in it; because it would be inflicting the punishment prospectively in anticipation of the practical nuisance to arise *in future*. This view was taken of the subject by the counsel for the plaintiff, who argued that the deed never became operative, because, before the expiration of the time, the Acts of 1777 and 1779 made emancipation unlawful and all attempts to grant it void, except license was had from the courts. Upon that position the Court entertains the most serious doubts. It is extremely questionable upon the purviews of those acts whether unlawful emancipations are void, in the sense of leaving the property in the former owner, either absolutely or subject to be divested by

a seizure of the slave, in the nature of an office found. The question has never been decided, though the intimation has more than once been given by eminent Judges that public policy required that the slaves should be forfeited, even where they were conveyed by deed to another person, for the purpose of future emancipation. All the cases have arisen upon wills or deeds upon that trust. There was no act of emancipation in any of them. In the case of executors it was, of course, held that a trust resulted to the next of kin; and upon the deeds, that they were either void for the want of capacity in the grantees to take, as in *Trustees v. Dickerson,* 12 N. C., 189, or, as in *Stephens v. Ely,* 16 N. C., 493, that the legal estate passed on a void trust, which therefore resulted. There has been no case upon a direct and immediate act, professing in itself to be an emancipation, until the present; and the Court declines deciding it without further consideration, as it is not necessary for the purposes of this suit. It is clear, we all think, that the acts contemplate other attempts at emancipation besides the admitted one by license; for it prescribes the con- (268) sequences and punishment for them. It is clear they cannot be effectual to constitute emancipation, even qualified, or for any purposes, for the slave remains a slave, and as such is to be sold, as one of the consequences. But the question is, whose slave? Does the title pass to the State instead of the slave, or does it remain in the owner, liable to be defeated by seizure for the public, and until such seizure can he reclaim the slave from any other possessor? To the defendants in this case the answer is of but little consequence, since, either way, it implies that he has no title; but to the plaintiff it is important, as he might recover, unless the sovereign be already the owner.

There are, however, other points in the case which appear to us to be conclusive against the plaintiff, and render an opinion upon the last unnecessary.

In another case brought by the present plaintiff, upon the same title, the Court had occasion to consider of the construction of the will of Joshua White. *White v. White,* 15 N. C., 257. By it he gives to his son Jacob a tract of land "and also every other article I have already possessed him with." The Court charged the jury that the assent of the executor

was necessary to pass a legacy, and left it to them to presume it from the evidence of the long possession and other circumstances, and also that if Jacob was in possession of the slave Hagar at the date of his father's will and his death, she did pass by the bequest set forth. We think that ordinarily this charge would be correct. But the question is, what was meant by an *article* of which the testator had possessed his son? It could only mean such things as he claimed as property, and which he had delivered as property. It has been argued for the defendant that for this reason this clause could not cover the slave, because, being a Quaker, the testator held that he could not have a property in a negro. We do not assent to that proposition, because, although the testator might deny the moral right to hold one in slavery, yet he might well understand that, legally, the title was in himself,

and for that very reason might have placed the slave
(269) under the care of his son in his life-time, and intended to give her to him by his will, under the expectation that he would not use the legal title inconsistently with the moral right, as he conceived it. But if, on the other hand, the friends of that day, and in particular the testator, thought that he had divested himself, by his deed, of the legal title also, then, however, it might be in law, he could not have placed the slave with his son as property, either beneficial or merely legal and nominal; and she cannot, therefore, be considered as a specific parcel of the bequest to the son. The deed of emancipation, the tenets of the society, the declarations of the son, the inventories of the estates and the deed of the son constitute evidence upon this subject, on either side, which made it so far doubtful as to render it proper that it should have been left as a question of fact to the jury whether the testator claimed a legal ownership, either generally or for a term, in the slave, and as such put her into his son's possession in order to determine whether she was included in that clause of his will. The presumption is in the affirmative, from the fact, supposed, that the negro was a slave and in the son's possession, which is not rebutted by the mere circumstance that the testator thought she ought not to be a slave. It is requisite that he should think she was not a slave in law, and that the jury should believe that he thus thought. As there was evidence on both sides upon that

point, we think the Court erred in determining it conclusively upon the mere words of the will.

As to the assent of the executor, there seems to be no reason to question the instruction, if it be assumed that the slave is included in the bequest, for long possession without disturbance from the executor is evidence of his assent.

Another exception not less formidable to the plaintiff's action is taken to the opinion of the Court upon the statute of limitations. From 1809 the defendant and his predecessors, as trustees, have assumed to have the legal title to these slaves, have hired them at some periods, and claimed to have the legal control over them at all times, though as a matter of conscience they disavow the moral right of applying to their own use, or that of the society, the fruits (270) of their labor, and allow the slaves themselves to enjoy them. Jacob White, the plaintiff's testator, held the possession of the negroes under the trustees, and by their consent. His will was proved in 1816, and his wife, who was an executrix of the will, but never qualified, retained the possession until her death in 1823. The executor died in 1820, but never interfered with the negroes nor claimed them, and the testator does not dispose of them by his will unless they are included in the residue. In the lifetime of the widow, the present plaintiff, who is one of the residuary legatees, claimed the negroes from the defendant, who refused to deliver them and claimed them as a trustee of the society. The Court charged the jury that the possession of the trustees, if it was entirely with the view of benefiting the slaves by allowing to them the enjoyments of freemen, without regard to the profit of the society, did not bar the plaintiff's action, for only an adverse possession of a person claiming a beneficial interest or property in some person would have that effect.

It seems to the Court that the statute runs whenever the cause of action accrues, and that the action of the owner of a slave arises from the fact of the detention or conversion of the slaves, and not from the intent upon which that detention or conversion was made. The defendant has now the same possession he has ever had. Is it of a qualified nature? Does he claim only a qualified right in a legal sense, subject to the claims of any other person of a different or higher legal

efficacy than his own? It is true that an adverse possession is, in its nature, founded upon the claim of exclusive possession, and that involves a benefit either to the possessor or some other person; but that is so because we attach to the idea of the possession of what is property the further idea of benefit or profit. But the wrong to the owner does not depend upon the fact of profit to the possessor or his expectation of it, but upon the denial of his right and his exclusion from the possession. He who withholds my slave upon the allegation that he is a freeman holds him adversely to
(271) me, and ousts my possession. If this be continued for three years, it does not, indeed, make the slave free, but it bars my action for the detention or the conversion. If this were not, no time would be a bar in trover for a conversion in sending the slaves out of the country, to Liberia, for instance; or, on the other hand, a person having the scruples professed by the defendant and other Friends upon the lawfulness in conscience of a property by one man in another never could be guilty of a conversion or detention of a slave. We think neither proposition is correct, but that the defendant may detain and convert a slave like other men, and that the statute will in like manner bar an action therefor against him or against others. The defendant's possession was not that of a finder for the owner, not knowing who was the owner, but it was a possession upon a claim legal of title in himself, and a denial that there was any other owner. This possession upon such a claim was inconsistent with the rights of the owner, if there should be any besides the defendant, and amounted to a conversion, and made the possession adverse to all the world.

Upon this ground, it is the opinion of the Court that the defendant was protected by the statute of limitations, and therefore there must be a new trial.

PER CURIAM. Judgment reversed.

Cited: Walker v. Faucett, 29 N. C., 47; *S. v. Jones,* 33 N. C., 157; *Thompson v. Newlin,* 43 N. C., 45; *Propst v. Roseman,* 49 N. C., 132.

DECEMBER TERM, 1835.

ABNER HARRELL & CO. v. JAMES OWENS.

The rule of diligence which measures the liability of common bailees for hire is not that by which the engagements of common carriers is to be tested. The latter can be excused from the nonperformance of their contracts by nothing short of the act of God or of the public enemy.

ASSUMPSIT, brought to charge the defendant, as a common carrier, for not delivering within a reasonable time certain articles in pursuance of the following written agreement:

"Received from Alpheus Forbes, Jr., on board the schooner Carolina, Cork, one hogshead molasses, three barrels whiskey, two barrels flour, one barrel sugar and one keg tobacco, which I promise to deliver unto Messrs. Abner Harrell & Co. at Mount Pleasant Fishery, on the Chowan River, N. C., they paying freight and lockage for the same, as customary.

"Norfolk, 28 March, 1834. JAMES OWENS."

Upon the trial at HERTFORD, on the last circuit, before his Honor, *Judge Settle,* it appeared that the (274) defendant was the captain or master of the schooner Carolina mentioned in the contract; that Mount Pleasant Fishery, the place where the plaintiff's goods were to be delivered, was situated about fifteen or twenty miles *below* Winton, on the Chowan river; that the usual time of a trip for vessels from Norfolk to Winton is six or eight days, though the voyage may be protracted three or four days longer by adverse winds and tides; that no such cause of delay occurred in the present case, but that the defendant, instead of stopping at Mount Pleasant, the plaintiff's fishery, on his way up the river, passed on to Winton, where he deposited a part of the plaintiff's goods, from which place the plaintiffs, some days afterwards, sent for and obtained them. The balance of the goods the defendant took on with him in a trip higher up the river, and on his return down delivered them to the plaintiffs at their said fishery. It appeared further from the cross-examination of one of the plaintiffs' witnesses that when the defendant was at Winton on his way up the river, upon his being informed that he had passed by the plaintiffs' fishery he stated that he had been told that the fishery was *above* Win-

ton, and witness expressed his belief that the defendant would have immediately returned to the said fishery if the wind and tide had been favorable. It was also proved by the person with whom the plaintiffs' goods were left at Winton that at the request of the defendant he had given immediate notice to the plaintiffs of such deposit. The plaintiffs, it appeared, had commenced hauling their seine at Mount Pleasant on 7 April, and their goods were received from Winton some ten or fourteen days afterwards. There was no allegation that any part of the goods had not been delivered at all, but the only question was, whether defendant had delivered the articles mentioned in his contract, or had caused them to be delivered to the plaintiffs within a reasonable time.

His Honor charged the jury that the defendant was bound to use all the diligence that a prudent and discreet man would use in the management of his own business; that if (275) he was not acquainted with the river Chowan and the several fisheries thereon, it was his duty to have made necessary and proper inquiries in relation to the place of the plaintiffs' fishery before he left Norfolk, and also of those he might meet on his voyage upon the river, and to have used all other means in his power to find out Mount Pleasant, the place of delivery. That if the jury should be of opinion that the defendant had used all the diligence and caution that a prudent and discreet man would use in the management of his own affairs in his endeavors to find out Mount Pleasant, the place of delivery, and that the articles were delivered to the plaintiffs as soon as the defendant could, after using this degree of diligence and caution, he was entitled to their verdict; but if, on the other hand, the jury should be of opinion that the defendant had failed to use the degree of diligence and caution before stated, they should find for the plaintiff and should give them such damages as they had sustained by reason of the defendant's failing to deliver the articles at the place stipulated within a reasonable time. A verdict was returned for the defendant, and the plaintiffs appealed.

No counsel appeared for either party.

GASTON, J. We are of opinion that there is error in the instructions given to the jury upon the trial of the issues in

this cause. The law for the advancement of trade, justly regarded as materially affecting the interests of the whole community, imposes upon public carriers a responsibility far more rigorous than that which attaches to ordinary bailees for hire. The rule of diligence which measures the liability of these bailees is not that by which the engagement of the defendant was to be tested. He could be excused from the non-performance of his contract by nothing short of the act of God or of the public enemy. It is not enough that he has exerted all the diligence which a prudent man would exert in the management of his own affairs to find out the place where the articles were to be delivered. Having engaged for freight to carry them to and deliver them at that place, he cannot allege ignorance, want of skill, or any excuse (276) arising from human fault or human weakness as a defense for violating his engagement. The true question is not one of *actual blame,* but of *legal obligation.*

The judgment must be reversed and a new trial awarded.

PER CURIAM. Judgment reversed.

Cited: Boner v. Steamship, 46 N. C., 217; *Pender v. Robbins,* 51 N. C., 209.

WILLIAM CARR AND THE TRUSTEES OF THE UNIVERSITY v. DAVID J. McCAMM et al.

Upon an issue of *devisavit vel non*, it is not absolutely necessary as a rule of law to prove, besides capacity in the supposed testator and the formal execution of the paper, the further fact by distinct evidence, that the testator knew the contents of the instrument; for the jury may infer such knowledge from the evidence of capacity and execution.

(*Downey v. Murphey*, ante. 82, cited and approved).

DEVISAVIT VEL NON, upon a paper writing offered for probate as the last will and testament of Hugh McCamm, deceased, by the plaintiff Carr, one of the executors therein named, and by the other plaintiffs, the trustees of the University, as residuary legatees in said supposed will.

On the trial at SAMPSON, on the last Spring Circuit, before his Honor, *Judge Seawell*, after much evidence produced on both sides relative to the sanity of the supposed testator at the time of the execution of the alleged will, it was proved by the testimony of the subscribing witnesses that the paper was not read over at the time of its execution, either by the testator himself or by any other person. It also appeared that it was written by John McCamm, to whose son a legacy of five hundred dollars was given in the will, and that no person was present at the execution but the testator, the writer and the subscribing witnesses.

His Honor charged the jury "that if they were satisfied that Hugh McCamm executed the paper as his last
(277) will, and at the time thereof he was of sound mind; yet if it should appear to them that the will was written by John McCamm, the father of the legatee, who was to be benefited by the legacy of five hundred dollars mentioned in the will, there ought to be evidence to them that the testator knew the contents of the will." Under this charge the jury found against the paper-writing, and the plaintiffs appealed.

Badger, for the plaintiffs.
W. C. Stanly and *Henry*, for the defendants.

DANIEL, J., after stating the case, proceeded: A disposing capacity in the supposed testator is necessary, and a knowl-

edge of the contents of the instrument; but, in point of law, such a knowledge is presumed from the fact of execution, if the capacity be satisfactorily established. In the case of Smith's will (*Downey v. Murphey, ante,* 90) this Court said: "Is there a principle to be found laid down anywhere in the common law, or a positive precept, that it is necessary to the validity of a will of a man, written in his last illness and when very weak from disease, by one who takes a large legacy under it, and was the confidential friend and adviser of the alleged testator, that those who offer the will should distinctly prove, besides the testable capacity of the maker and the due formal execution of the instrument, the further fact, by distinct evidence, that the maker knew and approved of the contents of the instrument? If there be such a proposition, it has escaped our researches among the treasures of the common law. After proof of capacity and execution, the common law lays down no rule upon the subject, but submits the general question to the jury for a decision according to their conclusions upon the actual facts of undue influence, imposition on the testator, his knowledge of the contents of the paper and assent thereto, under the comprehensive inquiry whether a fraud had been practiced." As we understand the charge, the Judge informed the jury that there ought to be evidence to show that the testator knew the contents of the will, over and above what presumptively arose from the formal execution of the paper, as a will; that the law de- (278) manded such further evidence of that fact before they were authorized to find in favor of the paper being a will, on the supposition of the case being as he stated it. In this opinion we think he erred. The non-production of such evidence by the plaintiff was but a circumstance which the jury might link with other facts and circumstances to aid them in their conclusion whether the paper had been fraudulently obtained or not. But it was not, in law, under the case put, incumbent on the plaintiff to produce other and distinct evidence that the testator knew the contents of the will, over and above that which was to be presumed from the formal execution, before he could demand a verdict in his favor. The judgment must be reversed and a new trial granted.

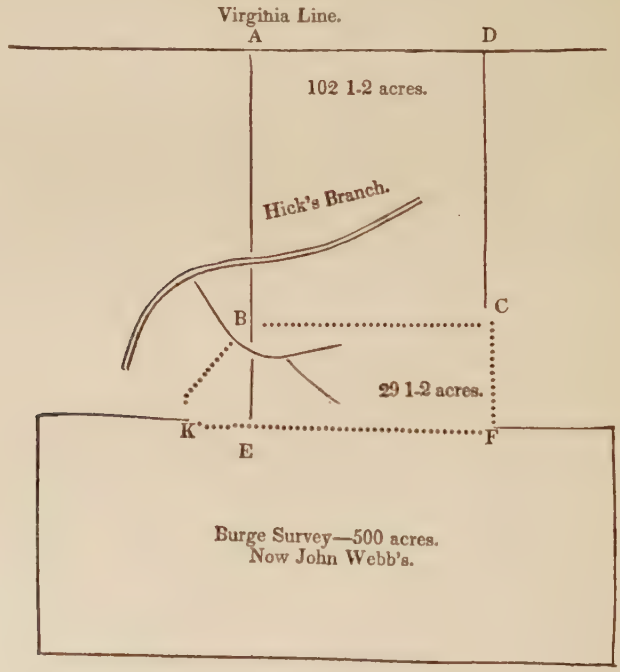
PER CURIAM. Judgment reversed.

DEN ex dem. of JOHN WEBB v. DAVID HALL.

In questions of boundary, a plat or map of an adjoining tract of land, made at the instance of the owner, is evidence, as the act of the owner, against him and all persons claiming the same land under him; though it is not conclusive, and may be explained.

EJECTMENT, brought by the lessor of the plaintiff to recover the possession of a small parcel of land included between the dotted lines B, K, F, C, as represented in the annexed diagram.

(279) DIAGRAM.



On the trial at STOKES, on the last circuit, before his Honor, *Judge Norwood,* the lessor of the plaintiff made out his case by producing a grant from the State bearing date in 1832, covering the land in dispute, and proving the defendant in possession.

The defendant set up title under a grant from the State to one David Lawson, dated in 1780, and showed a regular chain of conveyances down to himself. The grant to Lawson called for the following boundaries, to-wit: Beginning at the Virginia line on a white-oak, running south twenty-five chains, crossing said branch to a white-oak; thence east forty chains to a red-oak; thence north twenty-five chains to a post on the Virginia line; thence west forty chains to the beginning. The dispute between the parties was, whether the point represented on the diagram by B or K was the corner called for by the grant to Lawson. It turned out, upon a recent survey, that the line from A, at the (280) beginning corner of the Lawson tract, to K, was about twenty-four poles more than that called for in the grant. The defendant introduced several witnesses for the purpose of proving that K was marked and established as the corner of Lawson's grant at the time of the original survey; and then produced the field-book of Joseph Cloud, the original surveyor (he being dead), from which it appeared that Cloud had, in the year 1779, made a survey for one David Davidson of a tract of land containing 214¾ acres, on which a grant issued in 1783; and also that he had made a survey for David Lawson, in which he called for the Virginia line, a white-oak, thence south twenty-five chains to a white-oak, David Davidson's corner. It further appeared in evidence that one Beazley at one time owned the lands set forth in the grant to Davidson, and that the lessor of the plaintiff was then the owner of the same lands, having purchased them at a sheriff's sale under an execution against Beazley. The defendant then proposed to offer in evidence a plat made in the year 1825 at the instance of Beazley (who claimed all the lands adjoining that in dispute lying to the south and west) by Joseph Cloud, the original surveyor, with his notes and explanations, for the purpose of showing that the point K was the original corner of the Davidson tract, and the one mentioned in the field-book of Cloud as the corner of Lawson's grant or survey. Another plat, made by Cloud in the year 1822, setting forth the lands adjoining that in dispute on the east, south and west, as alleged by the defendant, was also offered by him, but it did not appear at whose instance

the latter plat was made, or from whose custody it came. These plats his Honor refused to admit, upon the ground that they did not appear to have been made by Cloud upon any survey by him then made, or from his field-book, or in the discharge of any official duty required of him by law. The lessor of the plaintiff then having offered evidence tending to show the original corner to have been at B, the jury returned a verdict for him. A motion was submitted by the defendant for a new trial because of the rejection of the plats,

(281) it being contended: first, that the notes and explanations contained in them were admissible as evidence in questions of boundary; and, secondly, that one of the plats was made at the request of Beazley, under whom the lessor of the plaintiff claimed the Davidson tract, and that it settled the corner of that tract to be at K, and was therefore evidnce against the lessor of the plaintiff as to the establishment of that corner. The motion was overruled, and the defendant appealed.

No counsel appeared for either party.

RUFFIN, C. J. We are of opinion that the survey or map of 1825 was proper evidence, upon the ground that it was made at the instance of Beazley, who was then the owner of the estate now claimed by the lessor of the plaintiff. The Lawson tract and the Davidson tract began at the same corner on the Virginia line; and the white-oak, it seems from the original field book, was the common terminus of the first line of both tracts. Beazley owned the Davidson tract, and also the tract called the Burge survey; and he claimed, according to the map, that the corner white-oak of the Davidson tract stood in the line of the Burge tract. The map would be evidence against him of the extent of his estate or claim, not upon the ground that it was the work of the county surveyor, or a plan subsequently drawn by the original surveyor, upon whose certificate the patents issued, but because it was Beazley's own act. And it is also evidence against those who claim the estate through him. But it would not be conclusive against either, and might be explained. *Bridgman v. Jennings,* 1 Lord Ray., 734. The plat of 1822, we think,

was properly rejected, because there was no evidence at whose instance it was made, nor from whose custody the paper came.

There must be a *venire de novo*.

PER CURIAM. Judgment reversed.

Cited: Perkins v. Brinkley, 133 N. C., 351.

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LUCY BENNETT v. GEORGE WILLIAMSON.

Where a testator bequeathed certain slaves to the children of his daughter, and expressed his wish that his son-in-law should not have the "use or control" of the said slaves; and then subjoined, "but if she survives him, then my said daughter *may have the use* of said slaves during her widowhood": it was *held*, that the daughter did not take a *legal* estate in the slaves upon which an action at law could be sustained, but that her interest was only an equitable one, and could be protected only in a Court of Equity.

DETINUE for certain slaves, tried at CASWELL, on the last circuit, before his Honor, *Judge Norwood.*

The plaintiff claimed the slaves sued for under the following clause in the will of her father, Emanuel Wicks: "I give and bequeath unto the children of my daughter, Lucy Bennett—Lydia and her sister Mary—all which, with their future increase, I give to them and their heirs forever. It is my will that Walker Bennett shall not have the use or control over the negroes given as above to my daughter Lucy's children; but if she survives him, then my said daughter Lucy may have the use of the said negroes during her widowhood, and no longer." The death of Walker Bennett, and the identity of the slaves sued for, with those mentioned in the will, were proved.

His Honor held, upon this statement of facts, that the plaintiff could not maintain an action at law; that the words in the will of Emanuel Wicks, "may have the use of the said negroes during her widowhood," gave her only an equitable interest, such as a court of equity alone could protect. In deference to this opinion, the plaintiff submitted to a nonsuit and appealed.

No counsel appeared for the plaintiff.
W. A. Graham, for the defendant.

GASTON, J. It was necessary for the plaintiff to show on the trial that under the will of her father, Emanuel Wicks, she had acquired a *legal* right to the slaves sued for, and we concur with the Judge below in the opinion that this was not shown. It seems to us that under that will the slaves (283) themselves were given wholly to the children of the plaintiff, and for her was provided a contingent benefit from the labor or hire of the slaves, which beneficial interest it is competent only for a court of equity to protect.

In the beginning of the clause in question, the absolute estate in the slaves is bequeathed to the children in as strong language as could have been employed for that purpose, and there is no subsequent limitation manifesting an intent to defeat or abridge this primary disposition. The testator did not design by the term "use" to convey the idea of temporary *ownership,* but simply of *benefit* or *profit.* This is apparent from that part of the clause in which he guards against his son-in-law having the use or control of the slaves. He could not have apprehended that a father would take a *legal* interest in the property given to children, and did not insert this provision as a security against that result, but he might reasonably fear that as natural guardian to the children he would assume the control over the property and thus obtain to himself its profits, unless this use were distinctly interdicted. This *use*, as distinct from ownership, which he declared the son-in-law should not have, he *permitted* to his daughter ("she may have the use") during her widowhood. The right to this use, as distinct from ownership, is not a legal title in the slaves, which is necessary to support an action of detinue.

No other construction consistent with the language of the testator could have been put on the will without hazarding the defeat of his main object. If the estate to the grandchildren determines in the event of their mother surviving the father, and gives place to the legal estate limited over upon that contingency, under what provision of the will will they reacquire the estate? It is a maxim of law that a condition or limitation annexed to an estate destroys the *whole* of the estate to which it is annexed, and not a *part* only of it.

There can be no question but that the children were the principal objects of the testator's bounty, and were designed to take the entire interest in the slaves—legal and beneficial—subject only to the contingent provision for their mother. But let the whole estate to them be destroyed by construing this contingent provision into a limitation, (284) and the will makes no disposition of the property in the slaves after the expiration of her temporary dominion.

PER CURIAM. Judgment affirmed.

Cited: Bennett v. Williamson, 30 N. C., 123.

ALEXANDER AND GEORGE TORRENCE, executors of ANN TORRENCE, v. WILLIAM GRAHAM.

1. Where no particular instructions were asked on the trial, a new trial will not be granted, unless the party praying it can show that the jury was probably misled by the charge of the Judge.

2. When a controversy turns upon the question whether certain slaves which were put into the possession of a daughter upon her marriage were intended as a gift or a loan, and there was no written evidence of the transaction, and no precise *formula* was stated by any witness to have been used in it, it is not erroneous in the Judge to leave the case to the jury to decide upon all the evidence, whether a gift or a loan was intended.

3. Where a submission to arbitration was by parol, and the award of the arbitrators was also unwritten, it is not error in the Judge to leave it to the jury to decide, upon the testimony, what was the true question submitted, and what was the real question decided in the award, and then to instruct them what would be the law, according as their finding might be the one way or the other.

TROVER, brought by the plaintiffs to recover the value of certain slaves alleged to belong to the estate of their testatrix, tried at IREDELL, on the Fall Circuit of 1834, before his Honor, *Judge Martin.*

The defendant set up a claim to the slaves in question, as the administrator of James McKnight, whose title to them was as follows: James McKnight, in the year 1800, intermarried with Betsey Torrence, the daughter of the plaintiffs'

testatrix, and soon after, upon his leaving his mother-in-law's house with his wife to settle to themselves, the old lady proposed to give him two negro girls, but he declined to receive them, stating that he did not wish to own that kind of property, as he had conscientious scruples about holding slaves. His mother-in-law insisted upon his taking them, alleging that her daughter was weakly and would need their assistance; but, upon his still refusing, she said she would (285) send them, not as his, but as the property of Betsy, his wife; and upon these conditions he agreed that they might be sent. The slaves were accordingly sent to his house, and remained in his possession until his death in 1831. Ann Torrence, the mother-in-law of McKnight, lived only about one year after the marriage of her daughter; and just before her death, having called in one John Harris to write her will, she sent a messenger to see McKnight about the negroes, in order, as she said, that she might "settle the matter about them in her will." McKnight stated to the messenger that he did not want the slaves—"there they were; the old lady could send and take them away." Several witnesses were examined to prove that McKnight always disclaimed the ownership of the slaves, though it appeared that on one occasion he stated to a witness that he had once sold one of the negroes, conditionally, to a man by the name of Hargrove, but that his wife objected and the bargain was annulled. After the death of Ann Torrence, the executors came to demand the slaves of McKnight, when it appeared that he was willing to deliver them up, but his wife was not; whereupon it was agreed to leave it to arbitrators "to decide what Mrs. Torrence intended should be done with the negroes. The day was appointed, and it was left to Messrs. Huggins and Meeks, who called on John Harris. The referees decided that it was the old lady's *wish* for her daughter, Betsy McKnight, to have them during her life, and that she should *"have* them accordingly." McKnight then said that if Betsy was under the sod they might take them immediately. The slaves were not mentioned in the will. Betsey McKnight died before her husband, in 1830. After the death of McKnight the slaves were demanded of his administrator, and upon his refusal to deliver them the suit was commenced, in 1832.

His Honor charged the jury "that it was for them to decide whether the slaves in question had been given or lent to Betsey McKnight, the wife of James McKnight; that if they had been given to the wife, and nothing said by the husband, it would vest the title in him, but that if it was proposed to give property to the wife, and the husband expressly refused it, the title would not vest in him. If a (286) slave was offered as a gift to the wife of a man who had conscientious scruples about holding such property, and he expressly refused to receive it in that way, no title would pass; but, as to the refusal to accept, they would take into consideration all the evidence bearing upon that point—the long possession, the sale to Hargrove, and every other circumstance bearing upon it. If it was a gift for life, the entire estate in the slaves would pass thereby, for there could not be reserved a remainder after a gift for life. As to the arbitrament and award, it seemed that it was submitted, and they decided that as it was the old lady's intent and wish that her daughter should hold the slaves for her life, they therefore awarded them to her for life. Still they would decide from the evidence of the submission whether it was the loan for life or the gift for life. Upon the whole, if it was a loan, find for the plaintiffs; but if it was a gift, either absolute or for life, find for the defendants." The plaintiffs had a verdict, and the defendants appealed.

During the progress of the trial some objections were made to the competency of evidence. A witness for the plaintiffs spoke of a meeting of the heirs and connections of Mrs. Torrence after her death, at which Mrs. Betsey McKnight was present, but her husband was not, and was proceeding to state the conversation and agreement of the parties, when the defendant's counsel objected to the evidence, but the objection was overruled by his Honor upon the ground that it was inferable from the facts already stated that the husband had assented to the agency of the wife as to the slaves. Another witness, who was one of the next of kin of the testatrix of the plaintiff, was called, but objected to, whereupon he executed a release of his interest in the slaves in dispute to one of the executors, and, being still objected to, he was admitted, as it did not appear, nor was it alleged, that he had any interest

in the said estate except in the said slaves. These objections were not insisted upon by the counsel in this Court.

Pearson, for the defendant. The Judge below made (287) this case turn upon a difference between a gift for life and a loan for life. A gift and a loan are different, as a loan is a limited gift; but a gift for life and a loan for life are the same, being both limited gifts. And as a gift for life vested the entire interest, so will a loan for life, for the same reasons. Formerly it was thought that there could be no limitation after a life estate, even by will. Then a distinction was taken between a gift of the *use* and of the chattel itself. This distinction is now abolished. *Manning's case*, 8 Rep., 187; *Lampet's case*, 10 Rep., 46; *Hyde v. Parrat*, 1 Peere Williams, 1; *Foscue v. Foscue*, 10 N. C., 538; Fearne Cont. Rem., 406.

1st. The loan or gift for life by Ann Torrence to her daughter vested the entire interest in her husband; for, although McKnight refused to receive the slaves himself, yet, as he assented to the loan to the wife for life, the slaves, by operation of law, became his property.

2d. The award of the slaves to the wife for life, acquiesced in by the executors, vested the entire interest in the husband, free from the idea of a gift or loan, and also from the dissent of the husband, and the Judge should have so charged the jury, and not have left it to them to decide from the evidence what should be the effect of the award. An award *in pais*, acquiesced in, is an agreement executed, or a bargain, and, although by parol, would, before the act of 1806 (Rev., ch. 711), have vested the title to slaves.

Badger, for the plaintiffs. It is not contended that there is a difference between the use of the slaves for life and the slaves themselves for life; the *use* of a thing and the thing itself being in law the same. But the rules of construction contended for by the defendant's counsel do not apply here. We have nothing but the verbal declarations of the parties; there is no formal instrument, and the intent of the parties as collected from their declarations are to govern. Here it was the intent of the parties that no interest at all should pass, but merely an indefinite loan at the will of the mother. It was not a vesting of the title to the slaves. Wherever a

question arises upon verbal declarations the Court cannot lay down the same rules of construction as upon instruments in writing.

No specific instruction was prayed as to the effect (288) of the will, yet still the Judge left it as a circumstance to the jury. As to the award, nothing was submitted to the arbitrators but simply to ascertain the intention of the mother with respect to her daughter's possession of the slaves. They were not authorized to make any order for carrying the intention into effect. The award did not affect nor design to affect the title, but only declared what was the old lady's meaning with respect to the possession.

Pearson, in reply. The construction upon the words of an instrument and words proved by parol must be the same in legal effect. The former construction as to the difference between the *use* of a thing and the thing itself was founded upon the very same reasons as the distinction now taken; and as the one has been abolished, the other cannot hold.

The award was that the wife *"should have"* the slaves during her life, and the award itself is more certain than the testimony of witnesses as to what was intended by it.

GASTON, J. As no specific instructions appear to have been asked by either party on the trial, the defendant is not entitled to a new trial unless he can show that the jury was probably misled by the charge of the Judge. Upon a fair construction of the charge, we think that it is not liable to this imputation. The main question in controversy was the intention with which Mrs. Torrence parted with and Mrs. McKnight took the possession of the slaves. It was *then* the settled law that if a parent put personal property into the possession of his daughter soon after her marriage, it should be presumed *prima facie* that the property was given absolutely in advancement of the daughter, but that this presumption must yield to proof that the property was only lent. *Carter v. Rutland*, 2 N. C., 97; *Killingsworth v. Zollicoffer*, 3 N. C., 72; *Robinson v. Devane, Ibid.*, 154. Much evidence was offered tending to show that the negroes in question had not been given, but lent. And the Judge was perfectly correct in leaving this part of the controversy to the jury, with directions to decide, upon all the evidence, (289)

whether it was a loan or a gift. If a loan, the law pronounced its effect to be that of a bailment, revocable at the will of the bailor. We need not perplex ourselves with the question, what interpretation it would put upon the case proposed of a *loan* expressly declared to be *for life*. No witness testifies to any precise *formula* which was used in the transaction so as to render it necessary to determine upon its technical operation. The transaction was informal, and the proper inquiry was to ascertain from the acts and declarations of the parties, and all the other attending circumstances, whether it was thereby intended to transfer any legal dominion in the slaves themselves, or only to permit them to be held free from hire until the owner should think proper to redemand them.

It is insisted, however, by the defendant that whatever might have been the understanding or contract when the negroes were put into Mrs. McKnight's possession, the award of the arbitrators gave a legal title for life, and that this, in the case of a chattel, constitutes the entire dominion therein, and that therefore the charge of the Judge was, on this point, erroneous. Before we examine whether such would be the operation of an *award* in those terms, it is well to inquire what were the instructions in relation to the award. The statement of his Honor's opinion on this part of the case is given so briefly as to render it somewhat obscure. But it was the duty of the party who excepts to the opinion to see that it should be so spread upon the record as to enable us to determine whether in truth it bears the interpretation which he affixes to it. We are not permitted to doubt but that it would have been stated more fully had it been desired by the defendant, so as to present distinctly the views which the Judge intended to convey. Examining the opinion as expressed in connection with the statement of facts to which it applies, we understand it to be free from this objection. It had been testified that, a short time before Mrs. Torrence died, she sent for John Harris to write her will, and dispatched the witness to McKnight to see him about the negroes, in order that the disposition of them might be settled in her will. He
(290) would not have them as property, and the will was silent about them. After Mrs. Torrence's death the executors demanded the *immediate* possession, which Mc-

Knight was willing to surrender, but his wife objected. It was then agreed to leave it to men to say "what Mrs. Torrence *intended* should be done with the negroes." There was no written submission, and therefore it is difficult to say what was its definite purpose—whether the parties meant that the arbitrators should pass upon the question of *legal* ownership or of *equitable title,* or only to ascertain what arrangement among the children of the deceased would best accord with the wishes of their mother. The referees called on John Harris, and after hearing him they decided (said the witness) "that it was the old lady's *wish* for Mrs. McKnight to have them during her life, and she should have them accordingly"; and McKnight remarked that if his wife were dead *they* might take them *immediately.* This was not in writing; it was made thirty years before the trial, and it is impossible to suppose that the precise words of it could be stated. In reference to this representation of facts, the Judge remarked that it seemed "that it was submitted, and that the arbitrators decided, that as it was the old lady's wish that she should hold the negroes for life, they therefore awarded them for life; but still the jury would decide from the evidence of the submission whether it was the loan for life or the gift for life." That is to say, as we believe it plainly imports, there is evidence of a submission to arbitrators in regard to these negroes now alleged by the defendant to have been given, but insisted always by the plaintiffs to have been only lent. There is evidence of a determination by the referees that Mrs. Torrence wished her daughter Betsey to enjoy them during life, and that therefore she ought to do so; but upon the evidence it remains for the jury to say whether the arbitrators decided more than that the negroes had been lent; that Mrs. Torrence did not wish the loan countermanded during Betsey's life; and that therefore she should be permitted, by those interested in the estate, to hold them as lent, so long as she lived; or whether they decided that the negroes had been given for life, and that therefore she should hold them for life. If they put the former construction on the award, they were advised to find for the plaintiffs; (291) but if the latter, then to find for the defendant. Of this advice, it seems to us, the defendant has no right to complain.

Some objections were taken below to the evidence, which have not been insisted on here, and which we think were properly waived.

PER CURIAM. Judgment affirmed.

Cited: Brown v. Morris, 20 N. C., 567; *Arey v. Stephenson,* 34 N. C., 38; *Graham v. Torrence,* 36 N. C., 213; *Ward v. Herrin,* 49 N. C., 24.

THOMAS SYMINGTON v. THOMAS MCLIN.

1. *It seems* that the construction to be put upon written instructions from a principal to his factor is to be determined by the Court, and not by the jury.

2. Where a factor sold the goods of his principal, together with some of his own, and took in payment for the whole a promissory note, made by another person, payable to himself, it was *held*, that the purchaser was discharged, and that therefore the factor became himself responsible for the price of the goods. And the Court seemed inclined to think that either circumstance, of taking the note of the third person or blending the claims of the principal and factor in the same note, if, in the latter case, it had been the note of the purchaser himself, would have been sufficient to create the responsibility in the factor.

3. Where, in addition to the circumstances stated above, it appeared that the factor concealed from his principal the fact of his having taken the note, and represented the purchaser as alone bound for the price of the goods, much more will he be held responsible.

4. The rights of principals, and the correspondent duties and obligations of factors, stated and elaborately discussed and explained, by RUFFIN, C. J.

ASSUMPSIT, to which the defendant pleaded the general issue, payment, and set-off; upon the issues joined on which the case was tried at JONES, on the Fall Circuit of 1834, before his Honor, *Judge Norwood.*

From the evidence given on the trial it appeared that the plaintiff was a commission merchant in the city of Baltimore, and that the defendant was indebted to him in the sum of two hundred and seventy-one dollars and ten cents; and being called on by the plaintiff's agent in May, 1828, he promised

to make payment in cotton, or the proceeds thereof, (292) some of which he was then shipping to Baltimore.

The shipment of the cotton, together with some other articles, was accordingly made to the plaintiff, and received by him 20 May, 1828, with instructions to "sell it immediately on its arrival for the best prices he could obtain." The plaintiff made sale of the cotton on 5 June following, to one Crook, upon a credit of four months, for the sum of ninety-seven dollars and fifty cents; and in settlement for the same, and for some articles of the plaintiff's own, sold at the same time, received the promissory note of one Jacobson, for the sum of one hundred and thirty-four dollars and ninety-nine cents. At the time of the sale, it appeared that Crook was not in good credit, but Jacobson then was, though he afterwards became insolvent before the expiration of the four months credit. It was proved that the mercantile usage in the city of Baltimore was, for factors who received consignments of cotton, without special instructions to the contrary, to sell on a credit of from four to six months. By an account current produced by the plaintiff, it appeared that the proceeds of the shipment above-spoken of amounted to two hundred and sixty dollars and eighty-two cents, after deducting charges, which included a commission on the sale of the cotton, and that the defendant was credited with that amount. It appeared further from the account that the plaintiff furnished the defendant with other articles, until 30 September, 1828, when the balance due the plaintiff was one hundred and sixty-nine dollars and fifty-three cents, which was increased to the sum of two hundred and sixty-seven dollars and eleven cents by recharging the defendant with the proceeds of the cotton, upon the ground that Crook, to whom it had been sold, had failed. The defendant produced a letter which he had received from the plaintiff, dated 30 September, 1828, inclosing the account above-mentioned, and stating, "I have charged you with the amount of cotton sold to Mr. Crook; he has stopped payment, but the creditors have attached about fourteen thousand dollars worth of cotton duck, and they think they will get paid. When I receive it I will credit you." It further appeared that on 2 May, 1829, they were not paid, and that Crook (293) and Jacobson had both failed. The note of Jacobson,

given for the cotton as above stated, was not produced on the trial nor tendered to the defendant.

The defendant contended: 1. That the plaintiff ought, in obedience to the instructions given by the defendant, to have sold for cash; and that the plaintiff did not use due diligence in effecting the sale. 2. That the sale to Crook for Jacobson's note was contrary to mercantile usage, and was not warranted by the usage of the place, and therefore made the plaintiff liable to the defendant. 3. That by taking the note of Jacobson, including the amount due both plaintiff and defendant, thereby combining the two demands in one note, the plaintiff became liable to the defendant for the amount of the cotton. 4. That to entitle the plaintiff to recover in this action, he should have produced on the trial the note of Jacobson, and have surrendered it, or so much thereof as the cotton sold for, to the defendant. 5. That the sale of the cotton, under the circumstances above mentioned, and the taking of Jacobson's note, was an extiguishment or payment *pro tanto* of the debt due from the defendant.

His Honor charged the jury upon the first point, that it was for them to say whether the plaintiff was instructed to sell for cash; and whether he used due diligence in effecting the sale; and that if he had violated his instructions in either of those particulars, the defendant ought to be allowed the value of his cotton; upon the second, that if they gathered from the testimony that, in the negotiation between the plaintiff and Crook, Jacobson agreed to give his note for the purchase of the cotton, the transaction was not such as to render the plaintiff liable for the loss; but that if Jacobson's note was afloat, and Crook gave it to the plaintiff for the cotton, then the transaction was of such a nature as to render the plaintiff liable for the amount of the cotton; upon the third point, that the law was in favor of the plaintiff; and upon the fourth, that it was *not* necessary in this action for the plaintiff to produce on the trial the note of Jacobson, or to surrender it, or so much thereof as the cotton sold for to the defendant,

(294) until it was demanded by the defendant, and the amount of the commissions due to the plaintiff tendered to him by the defendant. Upon the last point his Honor was of opinion that the taking of Jacobson's note under the circumstances mentioned, did not operate as an extin-

guishment, or payment *pro tanto* of the plaintiff's demand against the defendant. Under these instructions, the jury returned a verdict for the whole amount of the plaintiff's claim; and the defendant appealed.

W. C. Stanly, for the defendant, contended: That by the early law, factors were bound to sell for cash, and for cash only, and this rule was altered for the convenience of commerce. Yet if a sale be made upon a credit, at the end of the credit, cash only can be received. And the factor must sell upon the credit of the vendee only, because the principal may apply to the vendee and direct him not to pay to the factor. 1 Livermore Agency, 125-129.

2. Whenever the factor does anything which prevents the principal from resorting to the vendee, the factor himself becomes responsible to the principal. *Floyd v. Day,* 3 Mass., 405.

Where a sale is made, if the vendor receives the note of the vendee on another person, it is a payment and satisfaction, and discharges the vendee, and consequently the factor, who made the sale, is liable to his principal. *Whitbeck v. Van Ness,* 11 John., 409. *Breed v. Cook,* 15 John., 241.

3. If Jacobson's note was taken for Crook's debt to the plaintiff, as well as for the cotton, the plaintiff became responsible to the defendant, on account of the blending the demands. *Jackson v. Baker,* 6 Cowen, 183. 5 Term, 513-518. 3 Cranch, 314. 4 Esp., 159.

4. The note of Jacobson ought to have been produced and tendered to the defendant.

5. The instructions given to the plaintiff by the defendant should not have been left to the jury to ascertain their meaning. Selling for the best price means selling for the best cash price, and the jury should have been so charged.

Badger, for the plaintiff, argued: That wherever the factor has extinguished the demand against the (295) vendee, he becomes responsible to his principal; but that the taking a negotiable security was no extinguishment, unless so expressed by the parties. In this case the debt continued against Crook, and the principal might at any time have resorted to him. *Goodenow v. Tyler,* 7 Mass., 35; *Corlies v. Cumming,* 6 Cowen, 181.

RUFFIN, C. J. The complaint of the defendant's counsel, that his Honor left the nature of the instructions given to the plaintiff to be determined by the jury, is probably well founded. On a similar question *Lord Mansfield* observed, in *Macbeath v. Haldimand,* 1 Term, 172, that there was no evidence proper for the jury; for as it consisted of written documents and letters not denied, the import of them was matter of law. But the error did the defendant no harm, for, upon looking into the letter of advice, we think the defendant was not instructed to sell for cash. A factor may sell on a customary credit, without directions to the contrary, or if left to his own discretion. A general power to sell implies a power to do so in the usual way at the place where the sale is to be made. Willes, 407; 3 Bos. & Pul., 489. The only special instruction here was as to the time of selling. The direction to "sell for the best price" means no more than the law enjoins if the consignor had been silent. It is still to be inquired whether the best credit price or the best cash price was intended; and as the letter left that open, it must depend on the judgment of the factor honestly exercised and the usage of the trade. Upon the other question, of diligence, the Court is likewise of opinion for the plaintiff, upon the evidence given, and without any as to the state of the market, or whether the article was in demand, rising or declining in price. The factor must have some time to look out a purchaser; and a delay of fifteen days after the arrival of the vessel, without more, does not prove such negligence as will make the goods the factor's own, nor authorize it to be inferred.

It is possible the Court may mistake some of the facts which are deemed material to the other parts of the
(296) case, as they are not stated with perfect distinctness.

It is most satisfactory to decide questions raised by the parties, when they are seen to grow out of the real facts of the controversy rather than out of those put hypothetically; and this even when the necessity for the hypothesis arises from the fault of one of the parties, against whom, for that reason, the facts are to be taken most strongly.

It appears in the case before us that the defendant, residing in New Bern, was indebted to the plaintiff, residing in Baltimore, in the sum of two hundred and seventy-one dollars and

ten cents; and being called on by an agent, in May, 1828, promised to make payment in cotton, or the proceeds thereof, which he was then shipping to Baltimore. The shipment was accordingly made, and disposed of for two hundred and sixty dollars and eighty-two cents, after deducting charges, which included a commission on the cotton, of which the proceeds amounted to ninety-seven dollars and fifty-eight cents, at four months from 5 June. The plaintiff filled other invoices for the defendant up to 30 September, 1828; and the balance upon all the transactions up to that day was one hundred and sixty-nine dollars and fifty-three cents due to the plaintiff, which was increased to the sum of two hundred and sixty-seven dollars and eleven cents, by recharging to the defendant the sum of ninety-seven dollars and fifty-eight cents, upon the ground that Crook, to whom the cotton had been sold, had failed. To support that charge it was absolutely necessary for the plaintiff to show that he realized nothing from the sale, and that he had been guilty of no laches in selling to a person of doubtful responsibility. This the plaintiff attempted to do, by evidence that he took in settlement for the price of the cotton the note of another person, then in good credit, who had since become insolvent. It was not explicitly proved when Jacobson gave his note, nor to whom it was made payable, nor why he gave a note for the debt of Crook. But it appeared in evidence that the note was given for the price of the cotton, and also of other articles of the plaintiff's own, sold at the same time to Crook; and that on 30 September
the plaintiff transmitted his account of sales and his (297)
account current to the defendant, and mentioned in
the accompanying letter that Crook had failed, and therefore he had charged the defendant with the ninety-seven dollars and fifty-eight cents, but that his creditors were proceeding against his effects, and expected to get something from them, for which, when received, he would give the defendant credit.

Upon this case, the defendant moved the Court, under various modifications, to instruct the jury that the plaintiff was liable, and ought to give the defendant credit for the value of the cotton. The Court refused the instruction, in any of the forms prayed, and gave an instruction that if the note of Jacobson was afloat, and Crook gave it to the plaintiff for the cotton, the plaintiff was thus liable; but that, if, in the

negotiation between the plaintiff and Crook, Jacobson agreed to give his note, then the plaintiff was not liable, but the defendant must bear the loss. With the first part of the instruction, as a distinct proposition, the Court has nothing to do, in the present state of the case. The cause depends upon the correctness of the latter part.

Upon that, the first inquiry is, how the facts are to be understood. It has been contended for the plaintiff that Crook remained liable upon his contract of purchase; because the note of Jacobson, if payable to the plaintiff, did not extinguish it, unless it was agreed that it should be received in payment; and also, that it does not appear that it was payable to the plaintiff, and may have been made at the time to Crook, and by him immediately endorsed. From the terms of the instructions prayed and given, it is apparent that the note was not produced on the trial, as it ought to have been, by the plaintiff. Not that it was necessary, in the point of view taken in one of the defendant's exceptions, in order to give the plaintiff his action by a tender of it; for if it had been destroyed, the plaintiff might be entitled to recover, if his case had otherwise been sufficient. But evidence of it was requisite as a part of the transaction of sale; and the note itself was the proper evidence of its contents, and we do not perceive how any evidence respecting it was received
(298) in its absence. No objection was made, nor can now be taken, as to the competency of that evidence. Yet, as the plaintiff had the custody of it, every fair presumption that can arise from withholding it is to be made against him, as to those parts of the contents which do not appear from the evidence given. Hence, the responsibility of Crook upon the note itself, by endorsement or guaranty, or that it was payable to Crook, is inadmissible. The plaintiff gave no evidence of it, and the fact is within his knowledge, and the evidence in his power. By the terms of the instruction, the note was given on the sale, and was made under a stipulation of the contract, and, as it was not payable to Crook, must have been payable directly to the plaintiff. We cannot tell what was the pre-existent consideration for it, as between Crook and Jacobson; but the note itself was not pre-existent, but was made to the plaintiff for the value of the cotton, in

consideration, as we must suppose, of a debt which Jacobson owed Crook.

Upon that state of facts, this Court does not concur in the instructions given in the Superior Court.

We are of opinion that Crook, the purchaser, was not liable for the price of the cotton, but had paid it. If Jacobson's note had been payable to him, and he refused to endorse it, and it was taken without his endorsement, it would be presumed to have been accepted in payment, there being no fraud. *Whitbeck v. Van Ness,* 11 John., 409; *Breed v. Cook,* 15 John., 241. But when, by agreement between the three, it was made to the plaintiff, it must be taken to have been in lieu of Crook's responsibility, and as a payment without any express declaration to that effect. Such a transaction speaks for itself. Even in the case of a previous debt, if the creditor by agreement with the debtor, accept the note of a third person payable to himself, it is presumed to be in satisfaction, and extinguishes the original consideration, and may be pleaded in bar, or given in evidence under the general issue. Much more, when the seller agrees with the vendee, at the time of the sale, to take, and he does then take, for the price, the note of such third person. *Tatlock v. Harris,* 3 Term, 180; *Whitbeck v. Van Ness,* 11 John., 409; *Wiseman v. Lyman,* 7 Mass., 286; *Booth v. Smith,* (299) 3 Wend., 66. If one buy a horse, and get his debtor to give his note to the seller, who accepts the maker as his debtor—there being no deceit—no reason can be given why the vendor should be allowed to renounce the special contract, and recur to an original implied one for the price. There is no room for implication, for the sale by one, and the purchase by another, with the payment to be made by a third, are but parts of one entire contract, to which all those persons were parties, and in which the seller, by accepting the note without the vendee's guaranty, assumes the risk. Now, we think the plaintiff had no right to discharge Crook, nor in any manner to defeat the defendant's action against him.

It is a general principle that a sale by an agent creates a contract between the purchaser and the principal. It is true the factor need not disclose his principal, and if he does not he may sue in his own name, and the purchaser may also set-off a debt of the factor. But the principal has the right

to sue in his own name, or to receive the money. *Golden v. Levy,* 4 N. C., 141; *Deebee v. Robert,* 12 Wend., 417. And when the principal has demanded payment from the purchaser, and takes steps to recover the debt, the factor ceases to be the creditor, and cannot subsequently receive the money nor bring his action. Cowp., 255; 4 Camp., 195. This right of the principal raises a correspondent duty in the factor not to do an act whereby the direct remedy of the former against the purchaser will be lost and his debt extinguished. He cannot honestly deprive the owner of the property of his claim against him who bought it. He ought not to desire to confine him to a remedy to be had through the factor alone, or upon a security under his exclusive control; and the rules of mercantile law ought mainly to aim at subserving good faith, by visiting responsibility upon acts tending to bad faith. Upon sound principle, it would therefore seem that a factor ought to be personally liable for taking from a purchaser a security to himself, which extinguished the contract with the
(300) owner, constituted by the sale. No case in this State, nor in the English courts, has been cited to the contrary. But one from a most respectable court, in a sister State, has been adduced at the bar, *Goodenow v. Tyler,* 7 Mass., 35, in which it was held that a factor does not make the debt his own by taking a note payable to himself, unless he refuse to deliver it to the principal on demand, or negotiate it, or otherwise appropriate it to his own use—it being proved to be the usage in Boston for factors to sell on credit and take notes in that form. It was there admitted that, by the law of Massachusetts, a simple contract is merged in a negotiable note. If that be so, the decision, as a general proposition of law, does not seem to be reconcilable with the acknowledged rights of the principal, as it puts it in the power of the agent to disable him from prosecuting any direct remedy on them against the purchaser. Upon that ground the Court was divided in opinion. The Judge who tried the cause thought the factor liable, and that the most settled usage at Boston could not change the law. *Judge Seawell* puts his opinion upon the usage alone, and the other members of the Court proceed upon the usage, together with the convenience of having a written evidence of the debt, which should be in trust for the principal, and might be obtained by him on demand.

If, in the case before us, the note had been given by Crook, the decision in *Goodenow v. Tyler* would not be directly in point, because there is no evidence of the usage in Baltimore. But we do not deem it material to discuss the effect of that distinction, nor to contest positively the decision itself. The present case is essentially different in several respects. Here the note was not given by the purchaser, but by a third person; and, in the next place, a distinct demand of the plaintiff was blended in it with that of the defendant. In our opinion, those circumstances make the plaintiff chargeable to the defendant—if each of them does not. To repel the force of the latter circumstance, the case of *Corlies v. Cumming,* 6 Cowen, 181, has been relied on, in which it was held that a factor does not make himself liable by taking the purchaser's note to himself, nor by taking it for the whole price of several parcels of goods belonging to several princi- (301) pals; nor by giving up that note, and taking those of a third person, payable earlier, and endorsed by the original purchaser. In New York a promissory note does not extinguish the original contract of sale, unless it be so agreed, either expressly or as inferred from circumstances. It is upon that principle the judgment is founded; and it was said the remedy of the respective principals against the purchaser remained the same after the note was taken as it was before. It might be difficult to reconcile that deduction with those decisions, in the same State, which make the production of a negotiable instrument indispensable on the trial of the action on the original contract, in order that it may be delivered up. *Hughes v. Wheeler,* 8 Cowen, 77. If the rule be correct, when the note is for a single demand, it may yet, for that reason, be inapplicable to one for two or more demands; for in the latter case the factor cannot rightfully deliver the joint evidence of both debts, to one of the several creditors, with authority to him to cancel it. But from that deduction, in *Corlies v. Cumming,* there is now no occasion to dissent; for, whether correct or not, the right of the principal to an immediate action in his own name, against the purchaser, is expressly recognized, notwithstanding the note for the benefit of two. But that cannot be here; for Crook, who was the purchaser, was entirely discharged. The plaintiff not only left in the defendant no cause of action against the

purchaser, but disabled himself from helping him to one. Nor could the defendant sue Jacobson. There was no contract nor privity between them. Jacobson was not the purchaser; the case states expressly that Crook was. Jacobson was liable solely on his note, and not on the consideration of it, which did not enure to his benefit, but to that of Crook. It is said, however, that by applying to the plaintiff the defendant could have obtained Jacobson's note, which would have been equally beneficial to him; and this seems to have been the idea of his Honor, upon the reasoning in *Goodenow v. Tyler*. It would seem to us that the right of the principal is, at his own pleasure, to revoke the authority and arrest the action of his factor, and to become his own receiver; (302) and that the factor incurs immediate responsibility by placing the business in such a posture as gives to himself the control. It is an attempt to shift the power to the wrong hand, and to bring the principal into subjection, which ought to make the wrong-doer answerable for the debt. But how could the defendant apply for this note? He did not know of its existence. The plaintiff did not report Jacobson as the purchaser, nor his note as a security; and in the state of the defendant's information, he could not imagine that there was anything to oppose his general right to look to Crook, or that he had to ask from the plaintiff the transfer of any note, much less that of a mere stranger to him.

But from other facts of the case we think it cannot be supposed that if the defendant had, at any time before Jacobson's failure, applied for the note, it would have been assigned to him. This conclusion is drawn from the circumstances that a part of the sum secured in it was for a debt due from Crook to the plaintiff, and the other part was not sufficient to cover the balance in account due to him from the defendant himself. In each of these respects the case differs from both of those cited for the plaintiff. This part of the transaction is open to the general objection of its tendency to impair the faith of distant correspondents in mercantile integrity, and to tarnish the character for fair and honorable dealing which distinguishes our merchants as a class. On the strength of that faith and character, men now entrust to each other adventures for immense amounts, with a sense of perfect security that the sales will be honestly made, with reference to the interest of the owner only, and without any other advantage

to the agent than a just compensation for that service; and will be truly reported, and truly accounted for. It is going very far for a factor to sell in a lump the goods of different principals, and to take one security in his own name for the prices. But it is much more suspicious and dangerous for him to sell a parcel of his own goods, at the same time with his principal's, and to take one note for the whole. The owner generally resides at a remote place and is unable to make inquiries personally, but is nearly restricted to the factor himself as the source of the knowledge of (303) his transactions; and it is easy to disguise the truth, and to deceive the principal, even when everything is not exactly fair. Whatever tends to unfairness ought, therefore, when discovered, to be reprobated. Factors owe it to their own interest and standing to keep the transactions for others distinct from those on their own account. If they mix them, it is impossible to escape suspicion; and quite a slight one is fatal to their business and highly prejudicial to trade generally. When one bargain is made for the two parcels, there is a temptation and an opportunity, without great hazard of detection, to make that for the one dependent upon the other; and the factor may be able to get a great deal more for his own by taking a little less than the market price for the larger one of his principal. If this step were tolerated, the next would be to sell the goods of the principal, if the purchaser would liquidate a disputed account with the factor, or include in a security a doubtful demand. Courts ought not to countenance a mode of dealing which leads to such consequences. But where one security is taken for the whole in the name of the factor, it seems clear to us that he takes it as his own. It is not exclusively in trust, or for the sole benefit of the principal, but in part for himself—and that appropriates it. In *Goodenow v. Tyler* it was admitted by the majority of the Court that if the factor appropriate to himself a *note* payable to him, he makes himself the debtor; and negotiating the note, or refusing to deliver it on demand, are put as instances of such appropriation. Another example must, we think, consist in taking a note, not wholly in trust for an employer or employers, but partly for himself. When taken altogether for another or others, it is presumed that he holds it for him, or those who are entitled to the money, and will transfer it when requested; and therefore he was held not to be liable

before request and refusal. After Jacobson became insolvent the plaintiff might very willingly have handed over his note. But that does not determine the true question in the case, which is, did he intend, when he took it, to keep it as his own; or did he intend to transfer it, if asked? It must be
(304) seen in such a case that he did not mean to transfer it, at least not absolutely, and not unless the defendant would advance in cash, or render himself responsible for the part belonging to the factor. That condition he had no right to impose, nor to expect the defendant to comply with. But without a compliance, it is not to be supposed the plaintiff would have parted with the security, or even intended to do so. That is an appropriation. It is a strong presumption of reason that the note was made payable to himself because he had an interest in it; and therefore that he intended to keep it. It is tantamount to a refusal upon demand, for if demanded, it would not have been delivered. Hence, in *Jackson v. Baker,* reported in a note to 6 Cowen, 183, it was held that mixing a debt to the principal with one to the factor in the same bond, gave the former immediate recourse against the latter, unless he offered to assign the bond. And in *Floyd v. Day,* 3 Mass., 405, it was ruled that if an agent to collect a debt include it in a bond to himself for a debt of his own, his principal could not bring trover for the first security, or the last, but might recover in assumpsit, as if the debt had been paid to the agent. The presumption spoken of is almost certainly true in fact, in this case. The defendant was indebted to the plaintiff, and made the shipment to him to pay himself. He therefore knew the destination of the proceeds; and, although he was not, even after receiving it, confined to the consignment as a fund for his satisfaction *pro tanto,* yet the selling of the deposit and taking a note for that debt, and another due to himself, affords almost as high evidence as could be given that the plaintiff meant to change his debtors and keep the note to himself; which is rendered conclusive, when we find that he passed the proceeds of the cotton to the credit of the defendant in account, and, of course, charged on his books the maker of the note as a general debtor to himself for the whole sum due on it. We should think, therefore, that the judgment ought to be reversed, were there nothing more in the case.

But there are other circumstances in the accounts and correspondence, of concealment and misrepresentation, much to the discredit of the plaintiff, which are warnings of the danger of allowing the first false step of a per- (305) son, who undertakes to act for another, intermingling his own interests, in a bargain, with those of his correspondent. It is the duty of a factor to be early in his intelligence, and distinct in his accounts, and above all, explicitly to state in them every material fact, so that the principal may know the real state of his affairs. It has been before mentioned, that the plaintiff did not show any advice, at the time that he held Jacobson's note as a security for the cotton. More than that, on 30 September, 1828, six days before the note fell due, he recharges the ninety-seven dollars and fifty-eight cents to the defendant, upon the ground that Crook had become insolvent; and advised him of it, as if he had before reported him to be the purchaser, and as if he had become so upon his personal credit only. This was false in two particulars. Crook was not, and never had been, the debtor, and therefore the debt was not lost by his bankruptcy; and the pretense to the contrary denotes a consciousness that the dealings of the plaintiff were in violation of both law and usage. Again, it was false in withholding advice of Jacobson's responsibility, and raising a delusive expectation of getting payment by attaching Crook's effects. Why was Jacobson's note kept out of sight? Obviously in the expectation that the defendant knew nothing of him, and would never discover his liability, but rest contented under the loss by Crook's failure; and in that event the plaintiff could pocket not only his own part, but the defendant's also. It is no answer to this that Jacobson also failed. The plaintiff's letter and accounts contain a plain declaration to the defendant that he had no other security but the contract of Crook, by himself; and if the plaintiff ever held the note for the defendant's use, amount to a denial of it, if not to an actual conversion to his own use. There must be a *venire de novo*.

PER CURIAM. Judgment reversed.

Cited: Pritchard v. Meekins, 98 N. C., 247; *Delafield v. Construction Co.,* 118 N. C., 110; *Chard v. Warren,* 122 N. C., 84.

(306)

THE BUNCOMBE TURNPIKE COMPANY v. DAVID McCARSON.

1. In warrants upon penal statutes before a single Justice, there must be some reference to the statutes which give the penalty; and the omission of such reference in the process is a substantial defect that will be fatal even after verdict.

2. That clause of the charter of the Buncombe Turnpike Company (Act of 1824, Taylor's Rev., ch. 1258, sec. 13), which compels all persons living within two miles of the road of said company, and who are by law liable to work on public roads, to perform six days' labor on the said road in each and every year, is not unconstitutional, inasmuch as they are by the same charter exempted from paying tolls for passing over the road.

3. Whether a person subject to pay toll could be constitutionally compelled to work on the road—*Quære.*

4. The books of a corporation, containing entries, in accordance with its charter, when identified, are admissible to prove the organization and existence of the corporation.

5. The board of directors of the Buncombe Turnpike Company may, under its charter, appoint a manager, or overseer of the repairs of the road, without a deed under the corporate seal; and this appointment may be shown by the production of their books containing an entry of a resolution to that effect.

ACTION of DEBT, for a penalty incurred by the defendant for refusing to work on the plaintiffs' road, commenced by warrant before a single justice, and carried by successive appeals to the Superior Court, where it was tried at BUNCOMBE on the Fall Circuit of 1833, before his Honor, *Judge Norwood.*

The warrant against the defendant was "to answer the complaint of the president and directors of the Buncombe Turnpike Company in a plea of debt of six dollars, due by failing to work on their road as he was warned to do, between the first day of January and the last day of February, 1830." On the trial in the Superior Court, the plaintiffs produced the books of the corporation, showing the original subscription of stock and the appointment of a president and directors of the company, and also the appointment of a clerk. This clerk had, under the order of the company, entered on their books a resolution of the company appointing one William Kimsey to keep in repair a part of the road of the company, and to oversee the two-mile hands liable to

work on said road. Kimsey proved that the defendant lived within one mile of that part of the road over which he was so appointed overseer; and that he, Kimsey, (307) gave the defendant due notice to work two days on the said road with three of his hands liable to work on public roads; and that the defendant refused to do so. To the whole of this evidence the defendant objected, alleging: (1) That the organization of the corporation was not sufficiently proved; (2) that Kimsey's appointment by the resolution of the board ought to be evidenced by their corporate seal; and, (3) that that clause of the charter and Act of 1824 (Taylor's Rev., ch. 1258) which required the two-mile hands to work on said road was *unconstitutional,* inasmuch as it transferred the labor of the citizens to a private corporation. Each of these objections was overruled by his Honor, and the jury returned a verdict for the plaintiffs; whereupon the defendant appealed.

No counsel appeared for the defendant.
Saunders, for the plaintiff.

RUFFIN, C. J. There is a defect in the warrant, for which the Court is obliged to reverse the judgment of the Superior Court and arrest the judgment. The process has no reference to the statutes which give the penalties sued for; and the omission has been held to be fatal. *Scroter v. Harrington,* 8 N. C., 192. The objection was not taken in the Superior Court; nevertheless, under the Act of 1818 (Rev., ch. 962, sec. 4), this Court cannot overlook it, because our judgment must be such as, upon the whole record, that of the Superior Court ought to have been.

We suppose, however, that the purpose of bringing a suit for so small a sum to this Court was to obtain an opinion upon the matters of law involved in the defendant's exceptions; and, therefore, we have felt bound to consider them.

The principal objection is that which is directed against the constitutional power of the Legislature to require the defendant to work on the road; which is said to be transferring the labor of the citizen to a private corporation. We have a decided opinion that the Act of (308) 1824 (Taylor's Rev., ch. 1258) is, in this respect,

constitutional; and it seems also to be just. The making of new roads, and the reparation of those already in existence, being for the benefit, ought to be effected by the means, of all the members of the body politic. It is in the discretion of the Legislature to raise those means by assessing taxes on persons and property, or by directly exacting the personal service of the citizens. From a very early period those works have in this State been carried on by the personal labor of the inhabitants of the several districts within which the particular roads are situate. The road in question is laid out in the county in which the defendant resides; and, by sec. 9 of the charter, it is declared to be a public highway. The objection is, that, although it be thus declared, passengers are required to pay tolls to the stockholders, which makes it, substantially, private property. When this objection shall be made by one from whom tolls can, under the act, be exacted, it will be our duty to consider whether such a person can be compelled to work on the road, for the passing on which he has also to pay. But that is not the defendant's case. Sec. 7 exempts the citizens of Buncombe County from the payment of tolls. The plaintiffs have, therefore, a fair retort on the defendant of his own argument; and might say that it is unconstitutional to allow him to use their property without making compensation. But the argument on either side is seen to be unsound, when the two provisions—against one of which the plaintiffs might object, and against the other the defendant does object—are brought together. By sec. 13 the charter provides that such persons as by law are liable to work on public roads in Buncombe, and reside within two miles of this road, shall do six days' work on it in the year, under the direction of the president and directors of the company. This, then, is the price which the defendant pays for the use of the road by himself and the other inhabitants of the county; and they have to make roads in their neighborhoods for his use. The provision is probably beneficial to the defendant; for less
(309) than six days' labor of those who live within two miles of the road might be inadequate to keeping the necessary roads in a condition to be passed, while the turnpike must be kept in repair at a great expense to the company. But of the reasonableness of the quantity of labor

compared with the value of the privilege to the defendant, it is for the Legislature to decide, not the Court.

The case does not state the contents of the subscription and corporation books that were produced, and therefore we cannot say positively of what they were evidence. We suppose them to be the entries of such acts as the charter prescribes, as no deviation is specified. If so, those documents, when identified, were not only evidence, but complete evidence, of the organization and existence of the corporation. *Turnpike Company v. McKean,* 10 John., 154. But such evidence was not necessary. It is true that when a corporation is plaintiff it must, upon the general issue, show itself to be a corporation. But when the charter is by statute, that is done by showing the statute, and that the persons acting under color of it are in the peaceable enjoyment of the corporate franchises and rights thereby granted. This was ruled in *Nav. Company v. Neal,* 10 N. C., 520, and is also held in other States. *Trustees v. Hills,* 6 Wend., 23. The non-existence of the corporation, or the forfeiture of its charter, can only be adjudged at the suit of the sovereign against the usurpers of the franchises. They cannot be inquired into collaterally, at the instance of an individual, unless he show that it has already been so adjudged in favor of the State; in other words, that the charter has been annulled by judicial sentence and no longer exists. Here it appears that the corporation was *de facto* organized, and that it had made the road which the defendant was warned to assist in repairing.

The last objection is to the evidence, given on the trial, of the appointment of the manager or overseer of the repairs of the road, who warned the defendant to work. The case does not state the terms of the entry on the books as to the duties imposed, or authority conferred, by the directors upon the agent; nor does any objection seem to (310) have been taken, that the entry of the appointment did not profess to give him the authority which he assumed over the defendant. We have, therefore, no means of forming an opinion upon those questions; and we do not decide them, as they are distinct from that made by the exception. We also refrain from intimating, in anticipation, by what formal means the board or its agents must make known to the hands that their labor is required, and the time and place at

which they must attend, so as to convey a reasonable assurance to them that the order is authentic, and the obedience of each individual due to it. The case states that "due notice" was given to the defendant, which he refused to obey, without assigning any cause, because, as we suppose, he denied the right of the corporation altogether. We confine ourselves, therefore, to the exception, which is, that the appointment of Kimsey, who gave the notice, could not be proved on the trial by the production of the order of appointment entered in the directors' books, but must be shown by an act under the common seal of the corporation.

We think otherwise. Corporations by prescription, or those created by letters-patent, act only by deed. At least that is the general rule, as stated in the old books, of corporations generally. The common law devised no other means of action by those bodies, and admitted no other evidence of their action. Yet, in modern times, that has been departed from; and it is now said that, although they can grant by deed only, yet they may do many other acts without one; as *appoint a bailiff,* or the like. *Harper v. Charlesworth* (4 Barn. & Cresw., 575; 10 E. C. L., 412), But, however that may be in respect to bodies politic thus existing, it seems settled by many decisions in this country, and by the constant practice, that it is otherwise with respect to corporations created by legislative charter, which allows or requires the ordinary business to be done, not by the corporators as an entire body, but by a select board, as the agents of the corporation itself. The statutes control the common law; and the corporation has the capacities, and may act in the modes, pointed out in the statute. *Fleckner v. Bank,* 8 (311) Wheat., 338, is a full authority upon this point, and states the reasons for it with ability, as well as comments upon the cases. The charter to the plaintiffs seems to have been founded upon this very idea. By sec. 1 the corporators themselves are to act in "electing a president and three directors for conducting the business and concerns of the said company." By sec. 4 "the president and directors shall, *on behalf of the corporation,* have power and authority to agree with any persons for constructing or improving said road, and to make all such contracts touching the same as may be fit or expedient; and may appoint a treasurer, a

clerk, and such managers, and servants and toll-gatherers, as they deem necessary—any of whom they may remove at pleasure." This phraseology renders it manifest that the action of the corporation itself was expected to be seldom necessary or useful, except to raise the funds and select persons to superintendend the proper disbursement of them. All the other objects of the act, it was thought, would be better attained by authorizing, if not requiring, the corporation to act in all ordinary matters through the president and directors, *as its agents,* or, as expressed in the act itself, "on behalf of the corporation." The statute plainly contradistinguishes between the corporation and the board of directors; and treats the last as agents constituted, with plenary powers, by election, and not by deed. Now there is no rule of the common law that agents of a corporation must make a deed as the evidence of their transactions on behalf of their principals, if the same thing might be done on their own behalf by parol. Nor does the statute require it. A cashier of a bank gives his receipt for money paid to him, or deposited with him as the officer of the bank, and not an acquittance under the corporate seal, or a covenant to account. Of the transactions of the board of directors there ought to be some written memorial, as the body consists of several persons, and there is no method of authenticating their common mind. This charter prescribes several acts to be done by the board, in which it was clear that it was not intended they should act by deed, such as reducing (312) the rate of tolls, reporting their proceedings to the stockholders, and making an annual return of the amount of tolls to the General Assembly; and it does not require the contracts or the appointments, authorized in it, to be made by deed. Of course, they may be proved in any other method which fully establishes the terms or the fact sought for; and a written note in the books of the board, appointing the officers and servants, is, we think, sufficient for that purpose, or to show their duties and authorities therein prescribed—which indeed may, in many cases, be inferred from the nature of the office, or the practical exercise of power under the observation of the members of the board. In *Bank v. Dandridge,* 12 Wheat., 64, the Supreme Court of the United States went so far as to hold that the acceptance of a cashier's

bond might be found, without any recorded evidence of it, upon the acts of the cashier and the board, as presumptive evidence, although the charter required that it should be approved by the board before the cashier should enter upon his duties.

The new trial was therefore properly refused. But for the defect of the warrant, the judgment must be reversed, with costs in this Court, and the judgment arrested.

PER CURIAM. Judgment arrested.

Cited: S. v. Muse, 20 N. C., 466; *Trustees v. Chambers,* 56 N. C., 279; *Brown v. Keener,* 74 N. C., 719; *S. v. Luther,* 77 N. C., 493; *S. v. Shaw,* 92 N. C., 771; *Glenn v. Orr,* 96 N. C., 415; *Rumbough v. Improvement Co.,* 106 N. C., 466.

(313)

DEN ex dem. of JAMES GWYN and WILLIAM P. WAUGH v. JAMES WELLBORN and MONTFORD STOKES.

1. Where A, tenant in fee simple, mortgaged his land for a term of 500 years, and conveyed his reversion in trust for himself for life, and afterwards for his daughters, and died; and during the continuance of the mortgage term B got possession of the premises, and retained it for more than seven years, under color of title: and afterwards the daughters, the *cestui que trusts* of the reversion, obtained the possession, and the legal representative of the mortgagee made "a release" to them of the mortgage term, it was *held*, that the daughters having only an *equitable* estate in the reversion, the release could not operate as a legal extinguishment of the term, but at most could only be, *at law*, an assignment of the term; that this term was barred by the statute of limitations, and that consequently the daughters could not defend their possession against an ejectment brought by those claiming under B.

2. But although a tenant for years may be barred by the statute of limitations, yet the reversioner will not be affected thereby, until the expiration or extinguishment of the term; therefore, if in the case stated above the representative of the mortgagee had received satisfaction from the trustee, and surrendered the term to him, he, or his *cestui que trusts* holding for him, would have become entitled to the legal possession of the land, and might have defended it against the ejectment.

AFTER the new trial granted in this case at December Term, 1822 (9 N. C., 235), it was again tried at IREDELL (to which county it had been removed) on the Fall Circuit of 1831, before his Honor, *Judge Daniel,* when the defendants again had a verdict, and the plaintiffs appealed.

The facts necessary to a proper understanding of the case, as it was presented on the second trial, are so fully and clearly stated by his Honor, *Judge Gaston,* in delivering the opinion of the Court, that it would occasion a useless repetition to have them inserted by way of statement here. The case lay over several terms for the purpose of having it argued, but it was at last submitted without argument.

GASTON, J. There are several points in this case on which we wished an argument, and this wish we felt it our duty to express. But the parties have thought proper to submit the case without an argument on either side, and we have been obliged to proceed to judgment without the aids which were hoped from a discussion.

(314) In the opinion which we are called upon to review, the attention of the Court seems to have been directed to the examination of the equitable rather than of the legal title to the land in dispute. It is essential to the preservation of the integrity of our system of jurisprudence, in which the jurisdiction of legal and equitable subjects is assigned to distinct tribunals, that a legal claim should be determined exclusively on legal principles.

Upon the case made it appears that on 23 July, 1778, Hugh Montgomery was seized in fee simple of the premises in controversy, and that on the succeeding day he conveyed by deed of bargain and sale a term for five hundred years to John Michael Grafft, conditioned to be void on the payment to Grafft, or his assigns, of the sum of fifteen hundred pounds—one thousand thereof within three months after 24 July, 1779, and the residue within three months after 24 July, 1780. It appears also that Montgomery duly conveyed his reversionary interest in the premises to Kerr, Nesbit and Brown, upon certain trusts to himself for life, and after his death, then in trust for his infant daughters, Rachel and Rebecca, the wives of the defendants, Wellborn and Stokes; and that he died some time in the year 1780; that the mortgage money was not paid when it became due; that Grafft died, and that on 7 February, 1784, Bagge, his administrator, assigned the mortgage term with the debt to Marshall, by whom it was in like manner bequeathed to Benzein, who also bequeathed it to Canow, who on 17 May, 1815, executed a release thereof to Mrs. Stokes and Mrs. Wellborn, the *cestui que trusts* aforesaid, who were then in possession. The lessors of the plaintiff claimed title under a grant from the State to Joseph Holman, dated 3 March, 1779, by mesne conveyances from Holman regularly deduced, and a possession under this claim of title in themselves and their assignors, from the date of the grant down to 8 November, 1814, when the possession was taken by the defendants.

Did nothing else appear in the case, we apprehend that the judgment must be reversed, for that upon this view of it the plaintiff would be entitled to recover. Upon the exe-
(315) cution of Montgomery's mortgage, the legal estate for the term of years thereby created passed to Grafft, and by Montgomery's deed to Kerr, Nesbit and Brown the

legal reversion immediately dependent thereon was transferred to them. This latter conveyance is not made a part of the case. If, under that conveyance, or by other means, any legal estate was raised or transferred to the daughters of Montgomery, it is to be regretted that the fact does not appear. We cannot presume it, but must understand that they had no other than the beneficial or trust estate which the case states to have been declared for them in that conveyance. The statute of limitations which was suspended by several acts of Assembly during the Revolutionary War, began to run in favor of the possession under the grant to Holman in June, 1784. As Grafft, or his assignees, did not enter within seven years thereafter, and it is not shown that they were within any of the exceptions of the Act of 1715, he and all claiming under him were barred from any entry thereafter to be made. It is stated in the opinion of his Honor that, although the right of entry of the mortgagee was thus barred, the right of the reversioners was not thereby affected. We believe this position to be correct. The statute excludes and disables from entry such persons as fail to enter within seven years after their right or title shall have accrued. The ouster of a tenant for years under the claim of a fee by a stranger is said in the books to be a *disseizin* of him in reversion or remainder. Whether it is to be so regarded in our country, where an ejectment is the *only* remedy, or the only remedy in use, for trying disputed titles, may be a question worthy of consideration. But, however this may be, the reversioner, during the continuance of the prior estate, has no right to the *possession* of the land, and cannot therefore have a right to enter thereon. *Orrell v. Maddox,* Runnington Ejectment, Appendix 1; *Cook v. Danvers,* 7 East, 299. As his right of *entry* arises upon the expiration or extinguishment of the term, he has seven years thereafter to assert it, and until those seven years expire he is not *within* the bar of this statute. See 2 Preston Abstracts, 351. But there is a mistake in supposing upon the facts stated, that the release by Canow to (316) Mrs. Stokes and Mrs. Wellborn extinguished the estate of the mortgagee and thereby gave right of immediate possession to the trustees. In equity, indeed, the mortgagor is held to be the real owner of the land, the *debt* being regarded as the principal thing and the land the accessory, as

security for the payment of the debt. But at law it is otherwise. The legal interest in the term passes upon the execution of the mortgage, and if the money be not paid according to the condition of the mortgage, then the estate becomes absolute at law in the mortgagee. A court of equity will allow a mortgagor to redeem within a reasonable time by paying the principal and interest of the debt and costs, and when this is done the mortgagor acquires an equitable right in the term. But the term *in law* is not, by the payment of the debt after the day, divested from the mortgagee; it yet remains in the mortgagee, and is to be assigned, transferred or surrendered as other legal terms for years. Mrs. Wellborn and Mrs. Stokes had, as appears from the case, an equitable estate, subject to the charge of the mortgage debt; and it may be, as was declared in the opinion, that the release extinguished this charge, and that they then had an estate in equity freed and exonerated therefrom. But, however this may be, *in law* they had *no* estate in the land. The freehold, subject to the term, was in the trustees, or the survivor of them, or in the heirs of the survivor (if a fee simple), or in the heirs or devisees of Montgomery. If, therefore, Mrs. Stokes and Mrs. Wellborn acquired any interest at law under the deed of release, it was the interest of the mortgagee. The term was not thereby extinguished, but assigned; and if his right of entry had been taken away by the possession of Holman, *they*, claiming as his assignees, could not be in any better situation. We, however, must understand that nothing passed by the instrument. It is not set forth, but the case states it to be a *release* from the assignee of the mortgagee to those equitably entitled to the estate in reversion. There was no privity to make it operate as a release or surrender, and if an assignment could be made it is not shown that it
(317) purported to make an assignment of the term. Upon this view, then, the legal term was still outstanding, the right of entry under that term was barred, the trustees of the defendants had no right to the possession until the expiration of the term, and there was therefore no existing legal defense to the plaintiff's right to recover.

But there is an important fact in the case which is not prominently presented, but which nevertheless appears, and may entirely change the legal rights of the parties. The

mortgage deed is appended to and expressly stated to be made a part of the case, and on it is the following endorsement:

"Wilkes County, North Carolina, 8 November, 1815.

"Received of John Brown, trustee under the decree of the Supreme Court of North Carolina in the case of C. L. Benzein's executors and others, complainants, and William Lenoir and others, defendants, the sum of $9,263, being in full satisfaction for the within *mortgage* and *of the sum* decreed in the said suit.

"JNO. G. CANOW,
By his Attorney,
"LEWIS D. SCHWEINITZ."

We are to regard this endorsement as authentic, or it would not have been made a part of the case, and it must be understood to have been exhibited in evidence by the defendants. If the John Brown therein named is the same John Brown named in the conveyance of Montgomery and the survivor of those to whom the legal reversion was thereby granted, or has by inheritance or otherwise succeeded to the estate of the grantees in that conveyance, then at the date of this endorsement he had the legal freehold dependent on the term as trustee of the wives of the defendants. In the case of *Earl v. Rogers,* 2 Wilson, 46, the heir at law of one who had executed a mortgage term for five hundred years, brought an ejectment against the defendant who had the mortgage deed in *his* possession. On exhibition of the deed it was found to have an endorsement on it, without seal or stamp, in these words: "Received this .... day of March, 1738" (being after the day limited by the proviso), "of A. B." (the mortgagor) so much money "for all principal and interest till this day; and I do release the said A. B. and discharge the within mortgaged premises from the term (318) of five hundred years." Signed by the mortgagee.

It was resolved by the Court that before the statute of frauds a lease for years, either by deed or parol, might have been surrendered without deed by parol; that the words "release and discharge the term of five hundred years" are much stronger than words which in many cases have amounted to a surrender, *ut res magis valeat quam pereat;* that under the

statute a lease for any term of years may be created by writing without deed, and that the same may be surrendered by deed or note in writing, and that there was no occasion for a stamp upon this endorsement, it not being a deed. In the year 1815 we had no statute of frauds, and a surrender of a term might have been made wholly by parol. The endorsement in the case before us does not contain *words* quite as strong as those in the case quoted, "release the said A. B. and discharge the within mortgaged premises from the term," but connected with the surrender of the mortgage deed to him having the immediate legal reversion, the Court would construe the endorsement as amounting to a surrender of the term. The mortgagee delivers the lease to him whose estate commences in enjoyment as soon as the interest in the lease expires, with an endorsement that he has received full satisfaction "for the within mortgage, *and* of the sum decreed upon it." A surrender is "the yielding up of a particular estate to him that hath the immediate estate in reversion or remainder, wherein it may drown by agreement between them." 1 Inst., 337b. Surrenders are always favored in law. 1 Inst., 338a. They require no technical words but such only as express the intention to yield up. 2 Rolls. Abr., 497; Sheppard's Touchstone, 305. That intention, we think, would be plainly manifested here. The mortgagee declares his assent that the mortgage shall continue no longer, and declares this assent to him whose enjoyment takes place upon the determination of the mortgage.

We are also of opinion that the objection that Canow was not in possession at the time of this transaction was properly overruled. The possession of the mortgagor, or of (319) those who claim under the mortgagor, is the possession of the mortgagee. It is not stated in the case that a possession *in fact* ever was taken under the mortgage. A legal possession was transferred by operation of the deed of bargain and sale. But whether the possession was left with Montgomery and held by him and those in reversion until the dispossession by Holman, or was actually taken by Grafft, and after his dispossession was retaken by the defendants, seems to us immaterial; for, whenever retaken, it was a possession avowedly as representing the mortgagor, and therefore is *in law,* at most, but a tenancy at the will, or by

permission of the mortgagee. Having this possession by his tenants, the defendants, he could rightfully surrender the mortgage term to him having the immediate estate in reversion.

It has occurred to us that an objection might be raised, though none such is intimated in the case, to the validity of the assignment made by Grafft's administrator to Marshall because of the adverse possession of Holman. If the assignment were necessarily null as to all purposes and to all persons, we should be obliged to consider the case as though none had been in fact made. But, waiving all other modes in which it *might* be operative, we can see no reason why an assignment, like any other conveyance, may not take effect by estoppel between parties and privies, and thus legally operate to transfer the estate of the assignor, although he was not in possession when the assignment was executed. As the case finds the *fact* that the administrator of Grafft did *assign* or *convey* the term to Marshall, we must suppose it to be an effectual assignment or conveyance, so far as in law it *could* operate. As between the parties, therefore, the interest of Grafft passed to Marshall and ultimately to Canow, who made the surrender which merged the term in the reversion. The instant the term ceased, the right of entry accrued to him having the immediate reversionary estate. His *cestui que trusts* were then on the premises. Before the surrender of the term they were the tenants of the termor or mortgagee. Upon the surrender they became in law the tenants of the surrenderee, their own trustee.

The case, however, is altogether silent in informing (320) us who is the John Brown named in the endorsement. He is described therein as John Brown, "trustee under the decree of the Supreme Court in the case of Benzein's executors and other complainants, and William Lenoir and others, defendants." This description is hardly applicable to one who was not declared trustee by decree, but created trustee by act of the party. However this may be, we cannot assume as a fact that because the person mentioned in the endorsement bears the same name with the individual mentioned in Montgomery's conveyance, made thirty-four or five years antecedently thereto, the person designated in the endorsement is the same who is mentioned in the conveyance. If

he be not the same, then it does not appear that *he* had any legal estate in which the mortgage term could merge.

As the lessors of the plaintiff made out a *prima facie* possessory title to the premises—and it does not appear upon the facts stated that a right of entry had accrued to the defendants, or those under whom they claimed, so as to defeat the possessory title—we feel ourselves bound to reverse the judgment and to award a *venire de novo.* On a second trial the parties, seeing distinctly the points on which the controversy turns, will have an opportunity of distinctly showing the facts which may definitely settle their legal rights.

PER CURIAM. Judgment reversed.

Cited: Gilliam v. Moore, 44 N. C., 99; *Keathly v. Branch,* 84 N. C., 205.

SAMUEL GREEN v. ELIZABETH S. CALDCLEUGH, executrix of ALEXANDER CALDCLEUGH.

The mere existence of disconnected and opposing demands, between two parties, one of which demands is of recent date, will not take a case out of the statute of limitations. There must be mutual running accounts, having reference to each other, between the parties, for an item within time to have that effect.

ASSUMPSIT, tried at DAVIDSON, on the last circuit, before his Honor, *Judge Norwood.* The declaration con-
(321) tained counts for work and labor done in the service of the defendant's testator; goods, wares and merchandise sold and delivered, and moneys paid to the use of the testator. Pleas—set-off and the statute of limitations. To the last plea the plaintiff replied that the defendant's testator assumed within three years before the issuing of the writ. The plaintiff offered evidence to establish his account and to show the value of his services, which commenced in 1821 and ended in 1832. The defendant did not produce any account of articles furnished or debts owing by the plaintiff to her testator, but offered evidence that the plaintiff drew his support and all the means of his annual necessary expenses from her testator while engaged in his service. She

insisted that the jury should take this into consideration, not as a payment on account between the parties, nor as a set-off, but as affecting the rate of compensation for the plaintiff's services. The plaintiff admitted that he had drawn annually from the estate of the defendant's testator articles and money for his support and maintenance up to the year 1832. The defendant further proved that in May, 1831, her testator paid to a creditor of the plaintiff, at his request, the sum of three hundred and thirty-two dollars, which she insisted upon as a set-off. The defendant's testator died in April, 1833, and the writ was issued 30 July, 1833. His Honor charged the jury that there were mutual accounts between the parties; and the last items in the defendant's account being within three years, the whole claim of the plaintiff was taken out of the operation of the statute of limitations. Under this instruction the jury returned a verdict for the whole amount of the plaintiff's claim, deducting the sums paid by the defendant's testator, and the defendant appealed.

Pearson and *Mendenhall,* for the defendant, contended: 1st. That the rule as to accounts current was laid down too broadly by his Honor and was not applicable to the case before the Court. The rule is admitted in cases falling within the exception to the statute of limitations, 1715 (Rev., ch. 2, sec. 5). It extends to actions on the case as well as actions of account, and includes mutual current ac- (322) counts between other traders as well as merchants. Bull N. P., 149-151; *Coles v. Harris; Cranch v. Kirkman,* Peake's N. P., 121. To get the benefit of that exception, a special replication is necessary. *Webber v. Tivill,* 2 Saund., 125.

The rule does not extend further as a *rule of law,* but is a question for the jury. In *Catling v. Skoulding,* 6 Term, 189, it was held that mutual accounts containing items in time take the case out of the statute of limitations, independent of the exception; for the entering a new item and giving credit by a party is evidence to prove a promise to account. See *Heyling v. Hastings,* 1 Lord Ray., 421; 2 Saun., 127a, note. But, whatever might have been the old doctrine as to an acknowledgment taking a case out of the statute, it is now the better opinion that the action is founded

on the *new* promise, which must be an *express* one, or there must be such an admission of facts as clearly shows, out of the party's own mouth, that a certain balance is due from which the law can imply an obligation and promise to pay, or that the parties are yet to account and are willing to account and pay the balance then ascertained. See *Bank v. Snead,* 10 N. C., 500; *Peeples v. Mason,* 13 N. C., 368; *Ballenger v. Barnes,* 3 Dev., 460; *Danforth v. Culver,* 11 John., 146; *Lawrence v. Hopkins,* 13 John., 288; *Coltman v. Morsh.* 3 Taun., 380; *Pitman v. Foster,* 8 E. C. L., 67; *Acourt v. Cross,* 11 E. C. L., 124. And the case, upon all the circumstances, ought to be left to the jury to find the promise.

2d. This is not an account current; on one side there is but one item; and accounts, to take a case out of the statute, must be mutual and must have reference to each other. Mere counter-charges will not have that effect.

No counsel appeared for the plaintiff.

DANIEL, J., after stating the case as above, proceeded: It has been decided that if there be mutual running accounts *on each side,* then a new item in either account within three years may take the whole account on both sides out of (323) the statute; each party in that case being considered as having suspended the application for payment, on his side, of the demand, in faith of the mutual dealings. 1 Chitty Prac., 777; *Catling v. Skoulding,* 6 Term, 189; Peake, 121; 2 Saund., 125, 127, notes 6 and 7. But it seems to us that the true principle to be extracted from these decisions applies only in those cases where these items are clearly parts of one continuing mutual account, which, by the assent of the parties, are to be charged therein whenever the same shall be adjusted. This assent may be shown by direct evidence of an agreement to that effect. It may be inferred, also, when each party keeps a running account of the debits and credits of the account, or where one only, with the knowledge and concurrence of the other, is confided in to keep the account of all the mutual dealings. In these cases the new items are evidence affirming the continuance of an unsettled account at that time, and warranting the fair presumption of

a promise to settle it and to pay the balance which may be ascertained on settlement. The whole of the reciprocal demands, comprehended in such running accounts, are thereby taken out of the statute. The account is not to be split, but what shall be found upon all the items to be the balance is the true debt between the parties. That the mere fact of the existence of disconnected and opposing demands between two parties, one of which demands is of recent date, shall take the case out of the operation of the statute, shall be evidence of a promise to pay that other, or to allow it in a settlement, is, in our opinion, not an inference of law or of reason, although some adjudications and several loose dicta appear to sanction it. It would operate in practice to deprive a party of the privilege to oppose two defenses to a claim which he denies—set-off and the statute of limitations. The case before us does not state any evidence of an account current between the parties, unless such an account is necessarily to be implied from the fact of opposing demands. It does not appear that the payment by defendant's testator to the creditor of the plaintiff of the sum of three hundred and thirty-two dollars was intended to be on account of or in part payment of the plaintiff's demand. It was apparently wholly (324) disconnected therewith. The defendant offered it merely as a set-off. If it had been in part payment it would have taken the case out of the statute; it would have been a substantial admission of a continuing liability. *Burleigh v. Stott,* 8 Barn. & Cres., 36; 15 E. C. L., 151.

This Court being of opinion, from the case stated, that there were not mutual, open running accounts between the parties, so as to bring the case within the rule supposed by the Judge, a new trial must be granted.

PER CURIAM. Judgment reversed.

Cited: Northcott v. Casper, 41 N. C., 310; *Waldo v. Jolly,* 49 N. C., 174; *Hussey v. Burgwyn,* 51 N. C., 387; *Caldwell v. Beatty,* 69 N. C., 371; *Mauney v. Coit,* 86 N. C., 472; *Stokes v. Taylor,* 104 N. C., 400.

STATE v. LEWIS JOHNSON and CHARLES ROSE.

Whether an indictment will lie at the common law for a forcible detainer, after a peaceable entry—*Quære.* But it is certain that neither by the common law nor under the statutes, can it be maintained, where the entry is both peaceable and lawful.

INDICTMENT at common law for a forcible entry and detainer, tried at WILKES, on the last circuit, before his Honor, *Judge Martin.*

On the part of the State it was proved that the prosecutor was in possession, claiming to be owner of the premises on which the trespass was alleged to have been committed; that in one of the fields there stood an old dwelling-house, in which he had placed a quantity of straw and a basket containing a bag and an apron; that these articles continued in the house until the day when the trespass complained of took place; that on that day the prosecutor and his wife went to the house, intending to occupy it, when they found that the defendant Johnson had thrown the straw and the basket out of the house into the yard and was standing in the door with a large stick, and threatened them with personal violence if they presumed to enter; that the other defendant, Rose, was at that time engaged at work in the field. It was further stated by the prosecutor that he himself had done some plowing in
(325) the field preparatory to making a crop in it. The defendant Johnson then produced in evidence a sheriff's deed to himself for the same premises, by which it appeared that he had purchased them, before the time of the alleged trespass, under execution, as the property of the prosecutor; that after his purchase, and a few days before his said alleged trespass, he had entered on the premises, surveyed them, and directed the other defendant, Rose, to take possession of and occupy the same. He also proved that there was no shutter to the door of the house, but only some rails placed across the doorway to keep out stock. Upon this evidence the jury, under the instruction of his Honor, found the defendants guilty. A new trial being moved for, and refused, the defendants appealed.

No counsel appeared for the defendants.
The Attorney-General, for the State.

DANIEL, J. The case under consideration is an indictment at common law for a forcible entry and forcible detainer. The defendant peaceably entered, and the conviction is on that branch of the indictment which charges a forcible detainer. This brings us to the inquiry, whether Johnson, if he had a right of entry and did enter peaceably, had not a right to detain with force and with a strong hand. No question appears to be raised by the case as to Johnson's title. We take it, therefore, that the judgment and execution under which the sheriff sold (as well as the deed) were either exhibited or admitted on the trial. We have examined the case, and now decide it, on the understanding that whatever interest or estate the prosecutor formerly had in the land had passed to Johnson by the sheriff's deed, and that he had a legal right of entry. In *McDougall v. Sitcher,* 1 John., 43, it was decided that a purchaser of real estate under an execution may enter and take possession of the premises in a peaceable manner, though some goods of the former proprietor are left on them. The same doctrine was held by the Court, in the case of *People v. Nelson,* 13 John., 340. In *Taylor v. Cole,* 3 Term, 292, the Court of King's Bench held that a purchaser under a sheriff's sale, on an execution, might (326) peaceably enter and retain the possession. He may break open the outer door of the house and take possession, although goods of the last tenant remain there. 1 Bing., 58; s. c., 14 E. C. L., 59. If he who has a right to enter, obtains possession by *force* the person who had no right to retain the possession, cannot sustain an *action* for such forcible regaining the possession, so far as regards any alleged injury to the house or land; but at most, only for any unnecessary personal injury in turning him out, or avoidable damage to the furniture. *Taunton v. Costar,* 7 Term, 427; *Rex v. Wilson,* 8 Term, 357; *Turner v. Maymott,* 1 Bing., 158; 8 E. C. L., 280; *Wildbor v. Rainsforth,* 8 B. & C., 4; 15 E. C. L., 144; 1 Price, 4; *Rogers v. Pitcher,* 6 Taun., 202; 1 E. C. L., 355. But if he who has a right of entry, be guilty of a *forcible entry,* he may be indicted for a disturbance of the peace. In such a case, the owner ought to await the result of legal proceedings by ejectment. Johnson, having a right to enter, and doing so in a peaceable manner, which is defined by an ancient statute (5 Richard II., ch. 8) to be,

"not with strong hand, nor with multitude of people, but only in a peaceable and easy manner," had a right to *retain* possession so lawfully gained, by force, in the same way that he might defend any other portion of his real or personal property. The entry, to authorize proceedings in a summary way, before justices, under the statute of 8 Henry VI., ch. 9, must be an *unlawful entry*, followed by a forcible detainer, and so stated in the inquisition, or it will be quashed. *The King v. Oakley,* 24 E. C. L., 61. If an indictment will lie at common law for a forcible detainer, after a peaceable entry, a question on which much doubt is entertained, we hold it to be certain, that it cannot be maintained for such a detainer, either by the common law, or under the statutes, if the peaceable entry were also lawful. Johnson's entry was peaceable and lawful; and Rose, the other defendant, entered by his permission, peaceably, and made no effort even to detain with force. We think the judgment should be
(327) reversed, and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: S. v. Godsey, 35 N. C., 349; *S. v. Ward,* 46 N. C., 293; *S. v. Mace,* 65 N. C., 345.

ELVY LITTLETON v. REDDING LITTLETON et al.

A conveyance of lands made by a man, in contemplation of marriage, with the view of defeating his intended wife of her dower in those lands, is void, as against the widow, under the Act of 1784 (Rev., ch. 204).

PETITION filed by the widow of Zachariah Littleton against the children and heirs-at-law of her deceased husband, alleging that he had died seized of three several tracts of land therein described; in which she claimed dower, and prayed that it might be assigned to her. The defendants pleaded that their father was not seized or possessed of the lands mentioned, at the time of his death; and thereon the plaintiff took issue.

On the trial, at ONSLOW, on the Fall Circuit of 1833, before his Honor, *Judge Settle,* the defendants gave in evidence a deed, made to three of them, by their father, bearing date 10 April, 1805, whereby he gave and conveyed to them all the lands mentioned in the petition, and also, all the other estate, real and personal, which he then owned. This deed was acknowledged by the donor, in the County Court, in October, 1805, and registered in January following. To avoid the operation of the deed, the plaintiff insisted: first, that it had never been delivered; and, secondly, if it had, that it was void, as against her, because it was made upon the fraudulent intent to defeat her of dower.

It did not clearly appear at what time the deed was executed; whether before or after the plaintiff's marriage, which took place on 25 April, 1825. It was stated by the subscribing witness that it was executed about the time, and probably on the day the deed bears date; that it was executed about the time, and probably on the day the deed bears date; that it was kept by the donor; and that, after some misunderstanding with the plaintiff, he acknowledged it in court. Some months afterwards the donor deposited (328) the deed with the witness, with directions to keep it until he should be dead, and then to bring it forward. There were several children born of the marriage, and then the donor, many years before his death, took the deed from the witness and put it among his own papers, where it was found at his death. The donees were all infants of very tender years, when the deed was made; and the plaintiff was ignorant of its existence at the time of her marriage; and the husband continued in possession of the property during his life.

His Honor instructed the jury that there was no evidence of a delivery, at the time the deed was executed; nor did the acknowledgment of it, for the purpose of registration, amount, under the circumstances, to a delivery; nor did the deposit of it with the witness, unless it was given to him on behalf of the donees, to keep for them, or for their benefit; in which last case, the delivery would be good and irrevocable.

His Honor further instructed the jury that the right of a widow to dower was as much favored in law as the rights of creditors or purchasers are under the statutes to prevent frauds on them. That if, therefore, the deed was made after

the marriage, or, being before, was made in contemplation of it, and, in either case, with the intent to defeat the plaintiff of dower, it was void as against the plaintiff; and, for the purposes of this suit, the husband died seized of the land. He left it to the jury, upon the evidence, to infer, or not, as they might think the truth to be, whether the deed was made in contemplation of the marriage with the plaintiff; and with the intent alleged by her. The jury found that the deed was made fraudulently, and with intent to defeat the plaintiff of dower; and also, that said Zachariah was seized of the lands mentioned in the pleadings, at the time of his death.

The defendants moved for a new trial, for misdirection, which was refused; and a judgment was given for the plaintiff that she recover her dower of one-third of said lands, and that a writ issue, etc., to have the same allotted to (329) her; from which the defendants appealed.

J. H. Bryan, for the defendants.
No counsel appeared for the plaintiff.

RUFFIN, C. J., having stated the case as above, proceeded: The state in which the case is placed by the special findings of the jury requires the affirmance of the judgment, if the opinion given by the Court upon either point be correct; for that renders the other immaterial. It is not thought necessary, therefore, to discuss here the positions of the Judge who presided at the trial, upon the questions as to the delivery of the deed.

Upon the point of fraud, it must be taken upon the exception that the deed was made before the marriage. The legal question which arises is, whether the deed thus made, upon the express intent found, is void as against the plaintiff. In the case of *Tate v. Tate,* 21 N. C., 22, I expressed for myself the opinion that such a deed is void. In that opinion the whole Court now concurs.

The Act of 1784 (Rev., ch. 204, sec. 8) makes several important alterations in the rights of the wife. She was, before, dowable of all the lands of which her husband was seized during coverture; of which he could, by no method, deprive her. But she was not dowable of those of which the husband

was not legally seized, although he might have enfeoffed another in trust for himself the day before the marriage, and expressly to prevent dower. She was also entitled to one-third of the surplus of the personalty not disposed of by will; but subject to be deprived of the whole of it by the dispositions of the husband in his lifetime, or by his will. The provision for her is in some respects increased and in others lessened, by the act. She cannot now be cut off from the personalty, either by advancements to children or by testamentary gifts. She may dissent from the will, and then, or in the case of intestacy, shall have a child's part of the personalty, and one-third of the lands of which her husband died seized. Gifts to her own children, or to those of a former marriage, made over before her marriage, are to be brought into hotchpot for her benefit. *Davis v. Duke,* 4 N. C., (330) 526. This secures her, to a great extent, in a reasonable provision out of the personal estate. Not entirely, indeed. The husband may yet give away in his lifetime all his personal effects; and a child advanced cannot be compelled to restore. But no man is expected to strip himself, nor to advance some children, so as to leave others destitute. In this respect the wife is placed on the same ground with children not fully advanced, which is deemed a sufficient security to her. But in respect to dower, she stands alone, her rights being in opposition to all the children. It was necessary, therefore, to protect her, as against all of them, and against the acts of the husband in favor of any of them, which could have, or were intended to have, the effect of leaving her unprovided for. Hence, when her dower was confined to the lands of which he died seized, an enactment became indispensable that she should not be injured by those alienations which the husband made for the sake of defeating her. It accordingly comes in by way of proviso to the clause which fixes her dower, and declares that "any conveyances made fraudulently to children, or otherwise, with the intention to defeat the widow of her dower hereby allotted shall be held and deemed void, and such widow shall be entitled to dower in such land, so fraudulently conveyed, as if no conveyance had been made."

The Court does not understand his Honor's declaration, that the rights of the widow are as much favored by the Act of 1874 as those of creditors and purchasers are by that of

1715, to mean that conveyances void as to the latter class of persons, in respect of the consideration, are also, for the same reason, void as to the widow. The case did not call for any exposition of that general doctrine. The remark seems not to have been material to the instruction needed by the jury, and is supposed to have been intended to express only the idea that each class of those persons had established legal rights, and that every conveyance intended to defeat them is equally avoided by the authority of a statute. This leaves it to be settled upon the construction of each statute, what conveyances import in themselves the intent which
(331) vitiates them, under that statute. Between those statutes there seems to be, upon their terms, and from the subject-matter, a material distinction. Conveyances may stand against a widow, which could not against purchasers and creditors. Upon the Act of 1784 the observation is more obvious that only *fraudulent* conveyances are avoided, and not *voluntary* conveyances, as such. The statute, unlike that of 1715, is altogether silent upon the subject of the consideration. The intent spoken of is the actual intent to defraud the widow; and the statute specifies no fact as therein supposed to denote its existence or repel the imputation of it. The consideration of a deed does not necessarily—except as made to do so by statute—enter into the intent of the parties; although it is evidence of it, more or less strong, according to other circumstances. A deed made during the marriage, in trust for the husband himself, would be plainly within the act. The inference, that he divested himself of the seizin, to exclude his wife, would be irresistible. If made long before marriage, and not in contemplation of it, there would be no evidence of such intent; or, if made immediately before, and also communicated to the wife before marriage, there would be neither actual nor intended deception, without which there is no fraud. Such bars have, however, been since removed, by another statute, which makes the wife dowable of equitable interests; which shows, by the way, the interpretation proper for the Act of 1784, as to conveyances made at any time, which are wanting in good faith. But *bona fide* conveyances, that is to say, such as are not intended to defeat the wife, do not seem to be within the meaning, more than within the words of the act. Such are sales, to make

which an unfettered power is allowed the husband. Such, too, appears to be *bona fide* gifts, whereby the husband actually and openly divests himself of the property and enjoyment in his lifetime, in favor of children, or others, thereby making, according to his circumstances, and the situation of his family, a just and reasonable present provision for persons having meritorious claims on him, and with that view; and not with the view to defeat, nor for the sake of diminishing the wife's dower. If suitable ad- (332) vancements for children upon their going into the world, or setting up business, or other reasonable and immediate voluntary dispositions, were not deemed in the act *bona fide,* the purpose of the Legislature would have been more distinctly expressed, by saying that the widow should be endowed of all lands of which her husband had been seized during coverture, except such as he had in his lifetime conveyed upon valuable consideration. With respect to advancements to children, in particular, there would certainly have been a specific provision, since in the same act, the manner in which they shall be regarded, as between the children themselves, is expressly pointed out. Hence, the conclusion is adopted that the want of a valuable consideration does not constitute, absolutely and conclusively, the fraud mentioned in the proviso of sec. 8.

But the statute would be unmeaning if it did not embrace every case in which, whatever may be the form, the husband substantially reserves to himself the property, during his life. Such a disposition is necessarily but colorable, as determining presently his seizin. It is essentially testamentary, as between these parties, for the seizin of the husband determines only *eo instanti* with his life. A conveyance in those terms would, upon its face, create the mischief the act means to obviate. It would be bad, upon common-law principles, within the custom of London. *Turner v. Jennings,* 2 Vern., 612, 685; *Fortesque v. Hennah,* 19 Ves., 67. So, if from other circumstances it can be collected that the apparent immediate disposition is not *bona fide,* that is, was not meant to be simply what it purports to be, but that the donor intended that it should not interfere with his own enjoyment, but should hinder that of his wife, it would amount to the same thing.

It must be immaterial, in such a case, whether the deed be made before or after marriage. The remoteness of the day of its execution from that of the marriage may prove to the jury that it was not made with the intent imputed to it. It can have no other effect. For when a statute (333) makes conveyances, intended to defeat a legal right, void, upon the ground of fraud, all, whenever made, which were intended to have that effect, are necessarily included. When secretly made, in contemplation of the marriage, that special intent constitutes express, positive, or actual fraud—as it is indifferently called, in the books, in contradistinction to that which is implied by law, merely from the tendency of an act. Express fraud must render everything into which it enters, vicious. It consists in meaning, at the time of an act, to produce thereby a particular prejudice to another, and that very consequence will be produced if the act be allowed to stand. The Statute 13 Eliz. makes void only such conveyances as are intended to defeat *creditors;* and therefore, a voluntary conveyance by one then having no creditor is not apparently within it. Yet, if it be made with a view to becoming indebted, it is fraudulent and void. *Taylor v. Jones,* 2 Atk., 602. This construction is absolutely necessary to the preservation of the rights in favor of which the statute is made. A debt contracted immediately after the debtor has made himself insolvent stands upon the same footing with a previous one. There is the same intent in each case—inferred from the debtor's disabling himself to pay, at the particular juncture, when he owed a debt, or intended to contract it.

The same reasons apply to conveyances in prejudice of the right of dower. Indeed, they are stronger, upon the word used in the Act of 1784. It is "widow," which is not appropriate to the living woman whom the donor has married, more than to her whom he purposes to marry. It is properly descriptive of any woman whom the donor intends to defeat of her rights, as his widow, whenever she shall happen to become his widow; and makes the act reach every deed, at whatever period made, that was intended, when made, to intercept the marital rights of the wife, arising upon a marriage had or proposed.

Here the evidence, upon which the question of intent was left to the jury, was nearly as strong as it could be. The deed was made fifteen days before the marriage; to three very young children, by a former wife; was for the (334) whole estate, real and personal, of the donor; who carefully concealed it from the intended wife, kept the deed and the estate until the marriage, and afterwards retained the possession of the property about twenty-five years. It is perfectly apparent that a present advancement of the donees was the least of the donor's thoughts, and that he never meant to impair his enjoyment or control over the estate.

The opinion of the Court is, therefore, that the interlocutory judgment rendered is not erroneous; which must be certified to the Superior Court, in order that it may be proceeded on, and the plaintiff have her dower allotted. And there must be judgment against the defendants for the costs of this Court.

PER CURIAM. Judgment affirmed.

Cited: McGee v. McGee, 26 N. C., 109; *Barnes v. Roper,* 90 N. C., 191; *Clement v. Cozart,* 112 N. C., 421.

JOHN M. BLACK, administrator, etc., of HUGH BLACK, v. JOHN and DANIEL RAY.

1. A bequest by a testator to his wife, of a "girl named Hannah, and my horses, etc., and my plantation, with all the lands adjoining to it, during her lifetime," passes but a life estate in the negro girl.

2. The assent of an executor to a life estate in a slave extends no further than such life interest, and the reversion remains in the executor, which he may assert after the death of the life owner.

3. Where a demand was read aloud from a written paper, any person who heard it may prove the demand, without the production of the paper from which it was read.

DETINUE, brought by the administrator *de bonis non,* with the will annexed, of Hugh Black, for the recovery of certain slaves; and tried before his Honor, *Judge Strange,* at MOORE, on the last circuit.

The defendants claimed the slaves in question by virtue of a purchase of the entire interest in them from the widow of the testator, to whom he had bequeathed them in the following clause of his will: "To my dearly beloved wife, Effy Black, I bequeath my negro fellow Toney, my negro wench Jean, and a girl named Hannah; and my (335) horses, and one-half of my cattle; my hogs, sheep, and household furniture; my plantation, with all the lands adjoining to it, during her lifetime." Under this bequest it was contended for the plaintiff, and so decided by his Honor, that the wife took only a life estate in the slaves. For the defendants it was then objected that by the assent of the executors to the legacy of the wife, all the interest which they had in the slaves was divested, and that no suit could be sustained by them, nor by the administrator *de bonis non* after their death, for the said slaves; and that if any action lay at all, it must be by the next of kin; but this objection was overruled. The defendants next insisted that the plaintiff must prove a demand for the slaves, prior to the commencement of his action; whereupon the plaintiff, reserving to himself any right he might have to recover without such proof of a demand, introduced a witness, who stated that the plaintiff read aloud to the defendants a demand for the slaves in question, from a paper which he held, and then gave to each of the defendants a copy, and another to the witness. The witness stated further, that without the aid of such copy, he did not know whether he should have been able to have remembered the words of the demand, but that with its assistance he could state them from memory, without any reference to the written paper. The defendant's counsel objected, that although the demand was read aloud, yet as it was from a written paper, the paper itself must be produced, or its absence accounted for; but this objection was also overruled by his Honor, and plaintiff had a verdict and judgment, from which the defendants appealed.

W. H. Haywood, for the defendants.
Mendenhall and *Winston, contra.*

RUFFIN, C. J. We think the judgment must be affirmed. The gift of the slave and land, and all the other articles, is

in the same sentence. There is but a single disposing word, "bequeath," in the beginning of the clause, which extends to each thing given; and there is but one expression directing the quantity of estate, "during her lifetime," which is in the end of it, and necessarily controls the inter- (336) est in each subject of the gift. The only estate given, being for the life of the widow, the assent of the executors could go no further, and consequently the reversion remained in them. The *Anonymous* case in 3 N. C., 161, is an authority upon both points, if one were needed on either. We suppose the last objection was not seriously taken.

PER CURIAM. Judgment affirmed.

Cited: Williams v. McComb, 38 N. C., 453; *McKinley v. Scott,* 49 N. C., 198.

JOHN and JOEL HILL, executors of ROBERT HILL, v. MATTHEW M. HUGHES.

1. The gift of a slave by parol, since the Act of 1806 (Rev., ch. 701), operates as a bailment; and no length of possession under such gift will raise a presumption of title in the donee.

2. The possession of a son-in-law under a parol gift from his wife's father is not evidence of fraud in the donor, as to the creditors of the son-in-law, unless there be a conveyance of the slave by the donee, for the benefit of his creditors, which is known to the donor, and acquiesced in by him.

3. If the donee of a slave, under a parol gift, convey him in trust to secure creditors, but, by a stipulation in the deed, still retain possession, such possession is not the possession of the alienee, so as to operate as a bar to the donor under the statute of limitations.

DETINUE for a negro slave named Harmon, tried at STOKES, on the last circuit, before his Honor, *Judge Norwood.*

The case, as it appeard in evidence upon the trial, was, that the slave Harmon was the property of the plaintiff's testator in 1810 or 1811, when one William G. Haynes married his daughter; that upon, or soon after the marriage, the slave in question was put into the possession of Haynes,

by his father-in-law, and so continued until the death of Haynes, in 1834; that in 1823, Haynes, who had treated the slave all along as his own, conveyed him by a deed to the defendant in trust, to secure a debt which he then owed, and which he continued to owe until his death, and which was still subsisting at the time when this suit was brought; but by a stipulation in the said deed of trust, the possession of the slave still continued with Haynes; that Robert Hill,
(337) the plaintiff's testator, died in August, 1834, and soon after the plaintiffs, as his executors, brought this action to recover said slave of the defendant, who, after the death of Haynes in the fall of 1834, had taken him into possession, for the purpose of closing the trust.

For the defendant it was contended: 1. That from the great length of time that Haynes had had possession of the slave, all the writings necessary to prove the gift ought to be presumed.

2. That the plaintiff's testator, by permitting Haynes to hold the slave out to the world as his own, and thereby to get credit, upon the faith that the title was in him, was guilty of such a fraud as to prevent him or his executors from setting up their title, to the prejudice of such creditors.

3. That as the deed of trust stipulated that Haynes should remain in possession of the slave, the possession of Haynes, from the making of the trust in 1823, up to his death in 1834, was the possession of the defendant, the trustee; and that therefore the statute of limitations was a bar to the plaintiff's recovery.

His Honor instructed the jury that since the Act of 1806 (Rev., ch. 701) a parol gift of a slave operated as a bailment only; that in cases of bailment, the statute of limitations did not run until the termination of that contract; that the fact that Haynes claimed, and used the slave, as his own, would not terminate the bailment, nor would the conveyance to the defendant have that effect, unless accompanied with actual adverse possession for three years; and that the possession of Haynes could not have that effect. He charged further, that there was no evidence that Hill, the father-in-law, knew of the conveyance to Hughes; that without such knowledge there could be no fraud in the case, unless at the time of putting the slave into the possession of Haynes; and that it was

not seen how that could be a fraud upon the creditors of Haynes. He also charged that the presumption of title was, like any other presumption, subject to be contradicted by evidence. A verdict was returned for the plaintiffs, and the defendant appealed. (338)

No counsel appeared for either party.

GASTON, J. We find no error in the instructions complained of, to warrant the reversal of this judgment. There was no evidence from which a jury could presume a legal conveyance of the slave from Hill to his son-in-law. To hold otherwise would be an evasion of the rule of law distinctly laid down in the Act of 1806 (Rev., ch. 701), that has prescribed certain *forms* as indispensable in the transfer of slaves without consideration, "*No gift* of a slave shall be good or available in law or equity, unless made in writing; signed by the donor; attested by at least one credible subscribing witness; proven or acknowledged as a conveyance of land, and registered in the office of the Public Register." Previously to this act, when a slave was put into the possession of a son-in-law by his wife's father, and no more appeared, it was the presumption of law that the act was done gratuitously. The statute has not altered this presumption, but it pronounces that *no title* passes thereby. Necessarily, then, the slave is held upon a bailment, revocable at any moment by the bailor; and no length of possession, under such a bailment, can make the slave the property of the bailee.

On the question of fraud, the Judge properly instructed the jury that the deed in trust made by Haynes was not evidence of fraud in Hill, unless the knowledge of it was brought home to him. Haynes's long enjoyment of the slave may indeed have deceived his creditors and sureties into the belief that it was his property. Every day brings to our notice instances of great hardship and inconvenience resulting from the operation of this statute. But the Legislature must be presumed to have foreseen these, and to have considered them as lighter evils than the frauds which the statute was designed to prevent. It is our duty to carry out the enactments, and we have no right to judge of their policy. It

would be a manifest departure from the province of judicial interpretation to treat as a fraud what the law sanctions.

Without any evidence, therefore, showing a concur-
(339) rence of Hill in the unwarrantable use of the thing bailed, no court or jury can have a right to call the bailment fraudulent, or deny to it any of its legal properties.

It is perfectly clear that the instruction of the Judge was right on the question of the statute of limitations. The possession of the bailee cannot be adverse, until the bailment has been determined; and the alienee under the deed of trust did not take possession three years before this suit was brought.

PER CURIAM. Judgment affirmed.

Cited: Baird v. Brady, 19 N. C., 346; *Powell v. Powell,* 21 N. C., 380; *Green v. Harris,* 25 N. C., 220; *Overby v. Harris,* 38 N. C., 258; *Koonce v. Perry,* 53 N. C., 61; *Shiver v. Brock,* 55 N. C., 140.

THOMAS GILLET v. EDWARD S. JONES.

1. Upon a petition filed under the Act of 1809 (Rev., ch. 773) to recover damages caused by the erection of a mill, damages may be assessed for an injury to the health of the plaintiff and his family, as well as for overflowing his land.

2. If, at the time of the trial of a suit upon a petition for damages under the Act of 1809, five years have elapsed since the filing of the petition, a peremptory judgment for the annual damage for five years is proper, whether such annual damage be above or below twenty dollars.

PETITION, filed in the County Court of JONES, at September Term, 1829, to recover damages caused by a grist-mill, erected and occupied by the defendant. The petition alleged the plaintiff to be the owner of a tract of land in fee, on which was situate the dwelling-house occupied by himself and family; that on a stream which ran through his land the defendant erected his mill and dam, by which the water was thrown back upon the plaintiff's land near his dwelling-house, thereby covering a portion of his cleared ground

and rendering it unfit for cultivation; and also generating a large number of insects which infested his plantation and house, and corrupting the air so that his dwelling was rendered disagreeable and unwholesome. Upon the proceedings in the County Court the plaintiff had a verdict and judgment, and the defendant appealed to the Superior Court, where, on the last circuit, the case was tried before his Honor, *Judge Donnell,* when the plaintiff offered (340) evidence in support of all the allegations of his petition. To that tending to show an injury to the health of the plaintiff and his family, the defendant objected, but it was received by the Court; and the jury rendered a verdict for fifty dollars as the annual damages. Upon this verdict the Court gave judgment absolutely for five several sums of fifty dollars; that is to say, one for the year ending September, 1829, and one for each year following to September, 1833, inclusive; after which time the mill had not been kept up. From this judgment the defendant appealed.

J. H. Bryan, for the defendant. This is a petition for damages caused by the erection of a mill, under the Act of 1809 (Rev., ch. 773). The injury is a tort, and the petition cannot be revived against the defendant. *Fellow v. Fulgham,* 7 N. C., 254. The statute has merely given a new remedy; the injury is still the same in its nature. *Wilson v. Myers,* 11 N. C., 82. The Act of 1813 (Rev., ch. 863) renders it manifest that it is the overflowing for which the remedy is given; and the Act of 1809 speaks of the damages being *increased* by raising the water. It is, therefore, a trespass or injury to the possession, and the same evidence is necessary as would be required in an action of *trespass quare clausum fregit.* The petition is to be filed in the county in which the land is situate; the jury are to meet on the premises, and view and examine them. The statute does not prevent the bringing an action on the case for consequential damage. A person whose land is not overflowed an inch may bring this action on the case. The plaintiff must then either show possession actual, or title; and the same defense may be made as to an action of *trespass quare clausum fregit.*

The statute describes the injury to the *land.* The jury are to *view* the land. They cannot from that view decide

upon an injury to health—that is to, or may, be gathered from the opinion of medical men. The statute is rather passed to relieve the mill-owner from vexatious suits. The damages are to be assessed for *one* year, and judg-
(341) ment is to be rendered for five, unless the damages should be increased by raising the water or otherwise, if the mill is kept up. The injury to health may certainly at any time be redressed by an action on the case, so that the statute does not include that, as it certainly does an injury to the *land*.

Badger, for the plaintiff.

RUFFIN, C. J., after stating the case, proceeded: It is here insisted for the defendant that the Act of 1809 (Rev., ch. 773) extends only to the direct damage to the soil overflowed, and that any other consequential injury is without redress in this method of proceeding.

By the common law every consequential hindrance or disturbance in the enjoyment of that in which a man has right—*per quod uti non possit*—was deemed an injury for which an action on the case lay. The estate may be rendered less valuable by throwing a water-course back upon it, either in rendering the soil less productive or in making the dwelling-house uninhabitable, by reason of offensive smells or noisome pestilences. Each of those effects, we know, is a private nuisance at common law, and is classed amongst those injuries to real property for which the proprietor, as such, is entitled to recover damages.

The statute under consideration does not seem, in any of its provisions, to have been intended to abrogate the right of the proprietor of land to protect it from nuisances, or to recover the damages arising, in any way, from their erection or continuance. The main object of it was to restrain a malicious exercise of the right by the bringing of repeated actions for trivial damages, and to that end to suspend the remedy at common law until it could be ascertained, in the method designated in the act, that the complaint was not frivolous. The statute does not create any new right to damages, nor does it profess to abolish any pre-existing one. It only confers a mode of recovery, or, rather, the party is to

a certain extent restricted to a particular mode of recovery. Whatever was before a nuisance remains (342) a nuisance, and whatever damages arising therefrom were before recoverable may still be recovered. The jury is not bound down to the assessment of damages for the overflowing of the land by itself. The Legislature did not mean an injustice so gross. It is restrictive as to the remedy merely, and as to that, only partially. There are no words which either affirmatively exclude other incidental damages, or do so negatively by directing them to be assessed for the overflowing of the soil, and for that only. On the contrary, the terms are general, that any person *injured* by the erection of a mill shall apply by petition, setting forth *in what respect* he is injured; and that thereupon there shall be a jury on the premises, who shall be sworn to inquire whether *any* damage hath been sustained by the plaintiff *by reason of the erection of the mill*, and truly to assess the amount he ought annually to receive *on account thereof*. By no phraseology could the grievance to be set forth in the petition be left more at large, nor a more unlimited range allowed to the inquiries by which a just recompense may be ascertained. The act, indeed, speaks of the damages being increased "by raising the water" after suit, and of a jury "on the premises"; and that of 1813 (Rev., ch. 863), which is *in pari materia*, enacts that the owner of "land overflowed" by the erection of mills for domestic manufactures shall have the same remedy as is given by the Act of 1809 against the owners of grist-mills. It is hence argued that the comprehensive words before quoted must be controlled by the context, so as to confine the act entirely to the injury of overflowing land.

It may be yielded that the case of an overflowing, being the ordinary and most obvious injury of this kind, may have been more immediately in the mind of the Legislature. But even if that admission be correct, it does not follow that the law should deem that the only injurious consequence, nor furnish by this remedy adequate redress for any other. The utmost that can plausibly be inferred is that the act does not apply to any case but one, in which the overflowing of the soil constitutes either the whole or a part of the plaintiff's injury. When there is in fact an overflowing of the (343) land, the jurisdiction certainly attaches, and the pur-

poses of justice then forbid a construction which will prevent the remedy provided in the act from being commensurate to the whole injury arising from the erection of a nuisance of this kind, unless the words themselves plainly and conclusively express the contrary. Indeed, very soon after the act passed (in January, 1816), the Supreme Court, in *Mumford v. Terry,* 4 N. C., 308, construed it as extending to all cases. The Chief Justice, *Taylor,* emphatically says, upon its terms and design, taken together, that "in *every* case of a person receiving an injury from the erection of a mill, a petition *must* be filed in order to ascertain the extent, because upon that depends whether the common law is exercisable." Of the correctness of that position no judicial or professional doubt has reached us until that expressed on the circuit in *Purcell v. McCallum, ante,* 221, which was before this Court at the last term and struck us with surprise at the time. The policy of the act requires its application to all injuries of whatever character arising from the erection of a mill, for the statute may otherwise be rendered, in a great degree, nugatory. The object of the act is, mainly, the protection of the owners of mills against the necessity of abating them as nuisances, whether they be nuisances in respect of overflowing land and producing stench and disease, or in respect of any one of those effects, provided the annual damage be not twenty dollars. It will defeat that policy to take either of those cases out of the act altogether, since the owner of the mill will then be exposed to the successive actions, at the common law, of the person injured. Why should the Legislature allow a person, whose habitation is rendered less comfortable to the value of less than twenty dollars, to compel another to pull down his mill, and restrain one who sustains an equal damage from the overflowing of his land from the same course of proceeding? But if the statute be confined to the single case of overflowed land, what is to prevent the owner of land slightly overflowed from waiving that injury and suing at common law, and thus produce the mischief for which (344) the act intended a remedy? There seems to be no reason for giving or withholding the statute remedy, whether it be exclusive or cumulative, in the one class of cases more than in the other; and hence in *Mumford v. Terry, supra,* it was properly declared to embrace all.

But the present case falls certainly within the act, unless indeed it be construed to take away all *right* to damages for every injury but that of overflowing land, which would be against common right and inconsistent with the general words before quoted. Here there is both an overflowing of the soil and an injury to health. If the latter, when it exists without the former, cannot be redressed in this mode, yet, when they concur it is inconceivable that the Legislature meant that each of these consequences from the same wrongful act should be redressed by separate actions, when the statute itself relieves the defendant from a liability to a multiplicity of suits by substituting one for all that could before be brought in five years. The whole is one injury, affecting the plaintiff in different respects, but produced by one and the same act on the part of the defendant.

Since this law was enacted there have been numerous trials in which the stress of the controversy was upon the deleterious effect on the healthfulness of the plaintiff's estate, while the injury from overflowing was admitted to be nominal; and until *Purcell v. McCallum, ante,* 221, the bench and bar concurred uniformly in the construction now adopted. The opinion of the Court is clear that the evidence was relevant to a most important point of the inquiry before the jury, and was therefore properly admitted.

The counsel for the defendant has also insisted that there is error in rendering the judgment, for which it must be reversed. The error is alleged to consist in giving the judgment for more than the damage of one year.

The latter part of the first section of the act makes the verdict generally binding for five years. It admits two exceptions—the one, when the mill is not kept up; the other, when the damages are increased by the raising of the water, or otherwise. If the defendant shall surcease the injury for which the damages are prospectively as- (345) sessed, the right to that aliquot part of them shall fail; or, if he shall aggravate the injury, the former proceedings shall not conclude the plaintiff within the five years. It is clear from the perusal of the act that the draft of it did not emanate from a legal mind, for it speaks of "the verdict being binding for five years," and "of the verdict and judgment of the jury on the premises," and of the party's applying to the

clerk to issue an execution annually if the defendant should fail to pay the sum "assessed by said verdict," and is silent as to any judgment of the Court. But, being a legal proceeding, there must necessarily be a judgment, and that according to the course of the common law, except so far as it may be necessary to modify it, in conformity with the statute. Without a judgment there is no warrant for the execution which the clerk is directed to issue. As the verdict is declared to be binding for five years, so the judgment or judgments must also embrace that period. The question is, whether the judgment is to be entered at once for the whole time, or whether judgments are to be successively entered from year to year; and if the former, whether the judgment is to be absolute in its terms or conditional in reference to the circumstances before mentioned by which the rights and liabilities of the parties may be varied.

The act does not contemplate any action of the Court subsequent to the first judgment in order to give the plaintiff effectual process for the whole of the damages; for his application is not to be to the Court, but to the ministerial officer for execution. It follows, we think, that the judgment is to be rendered at once for the whole damages, with a *cessat executio* as to the portions not payable at the period of giving judgment. It was once held that damages accruing pending the suit, as interest, for example, could not be included in the verdict. But that has long since been exploded; and this act carries the contrary principle so far as in effect to give damages beforehand. In the expectation that the summary proceeding by petition, and the jury of view, would speed the verdict so that it would be given within the year succeeding the filing of the petition, the first execution author-
(346) ized is for the year preceding the suit. But when trials at bar upon appeals were afterwards allowed, and it thereby happens in every case that more than one year elapses, and frequently several, before the final decision, there is every reason for an immediate judgment and award of one execution for the whole amount of annual assessments that ought to be paid at the time of trial. To that extent the judgment must, of course, be peremptory. Nor does it appear to the Court how it can have any other character in respect of other parts of the damages. It is contrary to the

nature of a judgment for money merely that it should be conditional, either that the plaintiff's right should, according to the terms of the judgment itself, arise or be defeasible upon a future contingency. The judgment would not be final nor authorize execution without referring to the clerks the determination of the judicial questions whether the defendant had continued, augmented or abated the nuisance. Those inquiries can be made by the Court in appropriate methods without altering the form of entry or the effect of the judgment. If the damages be increased by the subsequent act of the defendant, and the plaintiff bring a new suit, the estoppel of the former judgment, if pleaded, would be removed by a replication of the new wrong, by means whereof greater damages accrued to the plaintiff. If the defendant do not keep up the mill, that may be shown by him in the same way that he can any other matter of discharge arising after judgment, upon *audita querula* or other remedy in the nature of it. In *Wilson v. Myers,* 11 N. C., 73, it appears that judgment for the five years was given in the first instance; and it is manifest from the words of *Judge Henderson* that this Court approved of it. Had its correctness been doubtful it is almost certain that the counsel in that case would have brought his writ of error on the matter of law instead of endeavoring to sustain that for error of fact after the amendment.

To all cases in which the damages are less than twenty dollars the foregoing observations are strictly applicable, because that far the proceedings are conclusive upon both parties, unless where the supervening matters already (347) mentioned arise. But it has been further contended that when the damages are twenty dollars or more, neither party is concluded but for the one year preceding the suit, and consequently that the judgment must be for that year only.

The Court cannot adopt that opinion. It may observed, in the first place, that the same objection presented itself in *Wilson v. Myers,* in which the annual damages were assessed to thirty dollars, and it was not made the ground of appeal or writ of error. But upon the act itself the Court is satisfied that the fifth section is a provision altogether for the benefit of the plaintiff, which gives him the election of the statute

remedy for the whole injury, or of that remedy for the damages of one year, and that of the common law for the residue. It is in the nature of a proviso to the previous enactment that the judgment shall be binding for five years, and declares that, notwithstanding that enactment, "the person injured shall not be *prevented* from suing" at common law when the damages shall be found as high as twenty dollars. When that happens the party shall not be prevented from recurring to his ancient remedy—that is to say, he shall be at liberty to do so; "and in such cases the verdict and judgment shall only be binding for one year." "In such cases" does not mean those merely in which the damages have been assessed to twenty dollars, but those in which that has taken place, and also the plaintiff, using the liberty allowed by the act, sues "as has heretofore been usual." Then and in that case it is that the verdict shall not conclude; but if the plaintiff chooses not to sue at common law, then it is conclusive. It is the defendant's own fault if he should suffer from heavy damages, because he can always discharge himself by pulling down his dam; and the act assumes that it is his interest and desire that one suit should determine the controversy. It saves him from costs and enables him to keep up his mill by making just compensation for the actual injury. There is no expression in the act from which it can be collected that he can be relieved from any part of the damages assessed but by abating the nuisance, and that is to be his own act,
(348) and not the effect of the judgment. So far as the object is solely the ascertainment of the damages, there is no necessity for a second suit, for they will be as correctly found by the jury in the one action as in the other. There is, then, no reason for allowing the defendant to recur to the common law in any case, thereby putting the plaintiff to prove again damages which have been already liquidated. For this reason the suit at common law given to the plaintiff is obviously not to enable him to recover compensation, but to induce the defendant to abate the nuisance. In a case where that purpose cannot be answered, the whole ground of election is swept away, and the judgment must be in favor of the plaintiff for the damages assessed on the petition, either because he has no longer an election or is presumed to elect those damages, since he can get nothing more. In the present case

the suit pended so long that seven years expired from the point of time to which the damages related; so that, by no possibility could he bring about an abatement within the five years, and his sole remedy was in the recovery of damages, to ascertain which there can be no necessity for a second suit, since that has been done in this.

Had the trial been sooner it would have been doubtless correct that the record should have stated the plaintiff's election. It would have been error, at least against the plaintiff, to render the judgment against his will for the whole five years, for he could not proceed in a second action for the recovery of damages for which he already had a judgment. It might perhaps be also error as against the defendant, since he may have the right to ask that the plaintiff be required to make his election that he may definitely know at what price he may keep up his mill. But where the lapse of time has absolutely deprived the plaintiff of any other relief than that to be obtained by the remedy he is then prosecuting—namely, his damages—all motive and opportunity for election is gone, and it is a futile attempt to make it appear more explicitly in the record than it already does. In the opinion of the Court, therefore, the judgment must be affirmed. (349)

PER CURIAM. Judgment affirmed.

Cited: Pugh v. Wheeler, 19 N. C., 60; *Howcott v. Warren,* 29 N. C., 21; *Cullifer v. Williams,* 31 N. C., 134; *King v. Shuford,* 32 N. C., 101; *Johnson v. Roane,* 48 N. C., 524; *Wright v. Stowe,* 49 N. C., 517; *McIntire v. Railroad,* 67 N. C., 279; *Burnett v. Nicholson,* 86 N. C., 103; *Goodson v. Mullen,* 92 N. C., 210; *Jones v. Comrs.,* 130 N. C., 453.

STATE v. ELIJAH DICKINSON.

1. The sixth and seventh sections of the Act of 1818 (Rev., ch. 963), modified by the Act of 1824 (Tay. Rev., ch. 1234), respecting the time within which the transcript of the record in appeals from the Superior to the Supreme Court, shall be filed in the latter, do not apply to appeals in criminal cases.

2. An indictment for fornication, under the Act of 1805 (Rev., ch. 684), must charge a fact to negative the relationship of marriage between the parties, or it cannot be sustained.

AT THE last Spring Term of the Superior Court of law for NEW HANOVER COUNTY the grand jury found the following bill of indictment against the defendant, to-wit: "The jurors for the State, upon their oaths, present: That Elijah Dickinson, late of New Hanover, on 10 March, in the present year, and on divers other days and times before and since, in said county, did commit fornication with one Mary Ann Paget; and then and there did bed and cohabit with her; and then and there had one child by her, without parting or an entire separation, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." At the same term, before his Honor, *Judge Seawell,* a motion was made by the defendant's counsel to quash the indictment for insufficiency, which was sustained, and *Mr. Solicitor Troy* appealed. The transcript of the record in this case was not filed at the last (June) term of this Court, nor until after the first seven days of the present term.

The Attorney-General, for the State, referred to *State v. Aldridge,* 14 N. C., 331, and *Eure v. Odom,* 9 N. C., 52.

No counsel appeared for the defendant.

(350) GASTON, J. A doubt has been suggested whether this appeal be properly constituted in this Court. The indictment was quashed for insufficiency at the Spring Term, 1835, of New Hanover Superior Court, and from this judgment the State appealed. The sixth and seventh sections of the Act of 1818 (Rev., ch. 963), modified by the Act of 1824 (Tay. Rev., ch. 1234), require that in all cases of appeal from the Superior to the Supreme Court the transcript shall

be filed within the first seven days of the term next ensuing the appeal; and in this case the transcript was not filed at the succeeding term, nor until after more than seven days had elapsed of the present term. On examination, however, of the provisions in those sections, and also of the peculiar provision made in the fourth section for certifying the judgment of this Court in criminal cases to the Superior Court, we are constrained to believe, notwithstanding the general terms used, that in *this* enactment criminal cases were not intended to be comprehended. It is indecent to suppose that where a conviction has been had in a capital case, or in one of a heinous nature, it could be intended that the clerk below should proceed *ministerially* to enforce the sentence appealed from, upon a certificate from the Clerk of this Court that the transcript of appeal had not been filed in time. It would be difficult, moreover, to ascertain what is "the execution or other proper process" by which *he* can enforce such a sentence. These terms seem applicable only to the enforcing of judgments in civil cases.

It may be that delays will sometimes occur by reason of transcripts not being speedily filed in criminal cases, and it is possible that some legislative action rendering it the duty of the clerks of the Superior Courts to forward the transcripts in due season, as has been done with respect to appeals from the County to the Superior Courts, would be salutary. But, on account of this possible inconvenience, we do not feel ourselves authorized to put upon the act a construction which it cannot reasonably bear. It may be also expedient for this Court, as a rule of practice, where appeals in criminal cases have been delayed beyond a reasonable period, (351) to require notice to be given to the appellee, so that neither the State nor the defendant may be taken by surprise in the argument of the appeal. In the present case, however, we see no necessity for this course, as we do not desire an argument from the defendant and we have heard one on the part of the State.

We are of opinion that the Court below did not err in quashing the indictment because of its insufficiency. The forms of indictments, like the rules of pleading, have been established with a view, among other purposes, to mark and preserve the distinct jurisdictions of the Court and the jury.

It is highly expedient, for the proper exercise of the latter, and it is essential to the security of the former, that as far as conveniently may be, all *the facts* which constitute the alleged offense should be charged, so that when the facts so charged are found to be true, *the Court*, whose duty it is to apply the law, may see *clearly* that an offense cognizable by that law has been committed. The indictment in this case is just as defective as that which came under the consideration of this Court in *State v. Aldridge*, 14 N. C., 331, on which the judgment was arrested. It differs only in leaving out the epithet "unlawfully," which in that case was used to characterize the cohabitation charged, and substituting instead of it the allegation "did commit fornication." But this substitution makes no material difference. In the case decided the Court could not know whether the jury did not err in their judgment of what was *unlawful cohabitation*, and in this had a verdict been rendered for the State there would have been equal reason to distrust their finding the *offense of fornication*. The facts which make up that offense should be set forth, and there is no difficulty in setting them forth with reasonable certainty. If the indictment had added that the individual with whom the improper connection is charged was a single woman, or was the wife of another person, or if it had negatived the relation of marriage between her and the defendant, it seems to us that it would have then contained enough to put the defendant upon his trial and to
(352) warrant a judgment, had he been found guilty.

A certificate should be sent to the Court below that it is the opinion of this Court that the indictment was properly quashed.

PER CURIAM. Judgment affirmed.

Cited: S. v. Lashley, 84 N. C., 755.

WILLIAM JONES v. DAVID I. YOUNG.

1. Voluntary conveyance made by a debtor, who owned at that time, and left at his death, sufficient property to pay all the debts which he owed at the time of such conveyance, is not necessarily fraudulent and void as to creditors.

2. Although a party may get a verdict, notwithstanding an erroneous charge against him, on a particular point; yet if the opinion delivered may have prevented the other party relying upon, or have excluded from the case stated, other evidence that was given, a new trial will be granted.

DETINUE, for a slave, tried at PERSON, on the last Spring Circuit, before his Honor, *Judge Martin*. On the trial the plaintiff, in support of his title, produced and proved a bill of sale from Reuben Jones, his father, to himself, for the slave in question. The defendant then proved that the bill of sale was made without any valuable consideration, and that the slave, after its execution, still continued in the possession of Reuben Jones, and there remained until his death, when the defendant, as his executor, took possession of said slave, together with the other effects of the testator. He further proved that at the time when the bill of sale was executed Reuben Jones was indebted to one Stephen Milton in the sum of about ninety dollars; that a warrant was brought and judgment obtained for this debt in the lifetime of Reuben Jones, and that after his death the judgment was revived by *sci. fa.* against the defendant as executor, and, upon an execution issued, the slave in controversy was levied upon and sold, when the defendant became the purchaser. In reply to this evidence the plaintiff proved that at the time when his father conveyed the slave in question to him by the bill of sale above mentioned he had other slaves and property sufficient to pay all his debts, and that in fact the (353) defendant, as executor, had discharged all the claims against the estate, leaving a balance of negroes and other property still remaining. The plaintiff then introduced much testimony to show that the defendant had acted fraudulently in procuring the sale of the slave and in purchasing himself at an undue value; and, among others, he introduced a witness by the name of Thomas, by whom he proved that the defendant had said to witness, while they were on their way

to attend the sale of the slave, "that the title of the plaintiff to the slave was good, as he had a firm bill of sale for him from his father, which expressed upon its face to have been given for a valuable consideration." This testimony of Thomas's was objected to by the defendant, but was received by the Court, whereupon the defendant offered to call several witnesses to prove that he had urged several persons to attend the sale of the slave, and that on the day of sale, and while the officer was crying the slave, he had told a negro trader that he thought the plaintiff's title was not good, though probably the plaintiff would sue for the slave, and he asked the trader to purchase. This testimony was objected to, and rejected.

His Honor charged the jury that the bill of sale from the defendant's testator to his son, the plaintiff, was fraudulent as to creditors, it having been made without any valuable consideration, though it was valid and binding in law upon the testator in his lifetime and upon his executor after his death; that if the jury believed from the evidence that the defendant had acted fraudulently in procuring the sale of the slave in question, and at the sale had prevented competition, so as to enable himself to purchase at an under value, such conduct would be a fraud on the part of the defendant and prevent his acquiring a title to the slave by virtue of his purchase under the execution, notwithstanding the debt, to satisfy which the slave was sold, was just and the proceedings thereupon were in accordance with the regular forms of law. The jury returned a verdict for the plaintiff, and the defendant appealed.

(354) *W. A. Graham*, for the plaintiff.
Nash, for the defendant.

DANIEL, J. The Judge charged the jury that the sale of the slave by the defendant's testator to his son, William Jones, was good against himself and his representatives, but was fraudulent as to his creditors, it having been made without a valuable consideration. The case states that, after the payment of all the debts of the donor, there were several slaves and other property left in the hands of the defendant, his executor, belonging to the estate of the donor, Reuben

Jones. The conveyance of the slave by Reuben Jones to the plaintiff, being by *deed of gift,* is not necessarily an act fraudulent and void as to the creditors of the donor if he had at the time of the gift, and left at his death, other property sufficient to pay all his debts due and owing at the date of the deed of gift. The *intent* to hinder and delay creditors might be repelled by such a fact. This case is not within the reasoning of the case of *Peterson v. Williamson,* 13 N. C., 326, for that was a *parol* gift of a slave, and the donor continued in possession and ultimately became insolvent. Nor is it within the principle decided in the case of *O'Daniel v. Crawford,* 15 N. C., 197, for there the creditor would have been entirely hindered in getting his debt satisfied if he could not have reached the fund covered by the voluntary conveyance. The Judge should have left this part of the case to the jury on the question of actual intent.

The question of fraud in the defendant's preventing competition at the sale, which seems mainly to have occupied the attention of the parties on the trial, was, as it seems to us, an immaterial one; for, if the plaintiff's deed of gift was not fraudulent and void as to the creditors of the donor, he would have been entitled to recover against the defendant, although his (the defendant's) purchase at the sale made by the officer had been ever so fair. On the contrary, if the plaintiff's deed had been fraudulent as to the creditors of the donor, he could not have recovered against the defendant, who had purchased under a judgment and execution at the instance of the creditor, although the defendant might have been guilty of fraud in preventing competition at the sale. (355) Such conduct might have been injurious to the creditors of the estate, but could not have helped the plaintiff if his title was void *ab initio.* But, even here, if it had been material, the Court erred, as it seems to us, in rejecting the defendant's evidence. The plaintiff had examined the witness Thomas and others to show by the defendant's declarations and actings that he had fraudulently prevented competition at the sale, with a view to purchase the slave himself at a low price. The defendant offered evidence to show that he had requested and made efforts to get persons to bid, and had declared to these persons that the plaintiff's title was not good. This evidence was rejected by the Court, and, we

think, improperly, if the facts had been material to the issue, because they were facts accompanying the very subject then under examination, viz., whether the defendant had by his conduct fraudulently prevented competition at the sale. The affirmative proof would have lain on the plaintiff; and when the plaintiff offered evidence of the declarations of the defendant, made before the sale, to establish that fact, it seems to us that the defendant was at liberty to repel the force of such declarations by proof of other declarations contemporaneously made, or made near the same time, relative to the same subject-matter; in other words, the declarations became a part of the *res gestæ*. The evidence was admissible, the force and effect of it to be left with the jury. The plaintiff obtained a verdict, notwithstanding the error of the Judge on the first point; yet, as the opinion delivered may have prevented the defendant relying upon, or have excluded from the case stated, other evidence that was given, we think it proper that the case should be retried.

PER CURIAM. Judgment reversed.

Cited: Irwin v. Cox, 27 N. C., 523; *Clarke v. Diggs,* 28 N. C., 161; *Arnett v. Wanett, Id.,* 44; *Houston v. Bogle,* 32 N. C., 505; *Thacker v. Saunders,* 45 N. C., 146; *Black v. Sanders,* 46 N. C., 68; *Clement v. Cozart,* 112 N. C., 418.

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(356)

DOE ex dem. HANNAH WOOD v. JAMES HARRISON.

Land cannot be sold under a *fi. fa.* which issues and bears *teste*, after the death of the debtor, without bringing in the heirs by *scire facias:* and this, although the *fi. fa.* may be an alias, the original of which issued and bore teste in the lifetime of the debtor.

EJECTMENT, tried at JONES, on the last circuit, before his Honor, *Judge Donnell.*

The plaintiff's lessor claimed by descent from her father, Martin Philyan, who, it appeared, died seized of the land mentioned in the declaration, in the month of June, 1813. The defendant set up title to the same land by purchase at

an execution sale under a judgment obtained against Martin Philyan at May Term, 1812, of Jones County Court. The judgment was produced, as were also five writs of *fi. fa.* regularly issued and returned at the successive terms of the Court from August Term, 1812, to November Term, 1813. On each of these writs of *fi. fa.* was endorsed "No sale," and nothing more. No writ of *fi. fa.* from November Term, 1813, returnable to the ensuing February Term, was produced, but evidence was offered tending to show that such writ did issue, was levied upon the land in dispute, and sold to the person from whom the defendant claimed. His Honor instructed the jury that as no levy appeared to have been made upon the land in the lifetime of Philyan, and no *scire facias* to have issued against his heirs, the title of the latter could not have been divested, though the writ of *fi. fa.* had issued from November Term, 1813, and been regularly levied and the land sold and conveyed by the sheriff, as contended for by the defendant. Under this instruction a verdict was returned for the plaintiff, and the defendant appealed.

W. C. Stanly, for the plaintiff.

J. H. Bryan, for the defendant: The principal question in this case is, whether upon a judgment obtained against a decedent in his lifetime his land can be sold under a *fi. fa.* after his death, without making the heirs parties by *sci. fa.* It may be admitted that, in England, before (357) an *elegit,* which is the only execution to subject real estate, can be sued out, a *scire facias* ought to issue, for there the heirs and terre-tenant are bound to contribute ratably; and unless all be warned, the others are not obliged to answer. 2 Saun., 7, n. 10. And it may be pleaded in abatement that they are not all made parties. In this State land is subject in the first instance to the *fi. fa.,* and, a *fi. fa.* having been issued in the lifetime of the judgment debtor, his land was bound by the lien, which lien would be lost if the creditor were bound to suspend his course of executions and sue out a *sci. fa.* The *sci. fa.,* in England, upon a judgment or recognizance, is considered so much in the nature of an action that he against whom it is issued may avail himself of his nonage by prayer, and the parol will demur. 1 Saun., 7, n. 4.

Since it is held here that the judgment (which in England is the ground of the charge on the terre-tenant) is no lien, if a *fi. fa.* be issued the Court should be more solicitous to preserve the lien of the *fi. fa.* In this case the first *fi. fa.*, bearing *teste* in the lifetime of the debtor, a lien was thereby created, and the land might have been sold under that. If this be true, it has repeatedly been decided that the lien is continued by *aliases* regularly issued. *Yarbrough v. Bank*, 13 N. C., 23; *Palmer v. Clark, Ibid.*, 354-359. "The security of the creditor is founded on the teste of the execution, and derives no aid from the levy." Per *Taylor, C. J.*, in *Frost v. Etheridge,* 12 N. C., 34. Though he die before the return of the execution, the land may still be sold, etc. Per *Hall, J., same case,* 43-296.

RUFFIN, C. J. The record presents but a single question, which is, whether land can be sold upon a *fieri facias* which issues and bears *teste* after the death of the debtor. Upon that question *Bowen v. McCulloch,* 4 N. C., 684, is a precise authority in the negative. A point is there left open, whether land is bound by the judgment, or only by the *fieri facias,* which has been since so decided as to restrict the lien to the *teste* of the *fieri facias,* if that be the process used. (358) Consequently, the sale must be made upon a writ having relation to a day previous to the debtor's death, or the heir must be brought in by *scire facias.* The authorities there cited establish the necessity of process against the executor in similar circumstances. If he is not to be concluded without being heard, surely the heir is equally entitled to the defenses that the executor has paid the debt, or that the heir has paid other judgment debts to the value of the land descended, or the like.

PER CURIAM. Judgment affirmed.

Cited: Parish v. Turner, 27 N. C., 282; *Jordan v. Pool,* 28 N. C., 289.

STEPHEN HENRY v. JOHN A. PATRICK.

Where the *intent* with which the delivery of a slave was made becomes important, in a contest about the sale of the slave, the circumstances evincing that intent, one way or the other, should be left to the jury; and in such a case it would be error in the Court to pronounce that the fact of sale is proved or disproved.

DEBT upon a bond. Pleas—payment; set-off; accord and satisfaction. Upon the trial at ROCKINGHAM, on the last Spring Circuit, before his Honor, *Judge Martin,* the defendant, in support of his pleas, introduced the deposition of one Dodd, which stated, in substance, that the defendant was a negro trader, and the plaintiff had purchased and received of him a negro boy named Miles, with liberty to return him and take another if, upon trial, he should not like him; that some time afterwards the defendant was on his way to the South with a parcel of slaves, and encamped on the public road, within two or three miles of the plaintiff's house; that plaintiff came to the camp and proposed to return the boy Miles and take another, to which defendant assented; that plaintiff then selected a boy named Jacob, fixed upon the price, which it was agreed should be paid by the bond of the defendant, which the plaintiff then held, and the balance in money; that the bond was not then delivered up, nor any money paid, the plaintiff not having the bond with him, but it was agreed that the defendant should call at the plaintiff's (359) house in a few days, execute a bill of sale for the boy and receive the bond and the balance of the money in payment for him; that thereupon the plaintiff took the boy Jacob home with him and returned the other boy, Miles. The defendant relied upon this evidence as proof of an executed contract of sale for the slave, which operated as a discharge or payment of the bond. On the other hand, it was contended for the plaintiff that the slave was only *bailed* to him; that the contract was not complete, nor intended to be complete, until the defendant should execute the bill of sale, and until that was shown to be done the bond remained undischarged and in full force. His Honor instructed the jury "that the circumstances deposed to by Dodd, if believed, constituted a sale and delivery of the slave, which transferred the title to the plaintiff, and that the defense was fully sus-

tained." Under this charge a verdict was rendered for the defendant, and the plaintiff appealed.

W. A. Graham, for the plaintiff.
No counsel appeared for the defendant.

DANIEL, J., after stating the case and the circumstances particularly relied upon by each party, proceeded: It seems to us that the Court should have left all these circumstances to the jury for them to ascertain with what *intent* the delivery of the slave to the plaintiff was made. If the delivery was of the slave, as the property of the plaintiff, under the parol contract of sale, and the bill of sale which was afterwards to be given was only for further assurance, then the slave passed to the plaintiff and was at his risk. If the slave was put into the possession of the plaintiff, but not as his property, until a bill of sale should be executed by the defendant, and it was understood and intended by the parties that the title of the slave should not pass until the bill of sale should be so executed, then the possession of the plaintiff was a *bailment*, and the risk was with the defendant, and it would be no payment of the bond on which this action is founded. The (360) Court decided upon the intent arising out of these various circumstances, when that intent, as it seems to us, should have been left to the jury. A new trial must be granted.

PER CURIAM. Judgment reversed.

Cited: Caldwell v. Smith, 20 N. C., 195; *Featherstone v. Featherstone,* 33 N. C., 319.

JAMES YOUNG et al. v. JOSEPH McD. CARSON, administrator of ANDREW YOUNG, et al.

A bequest by a testator to his wife in the following words: "I wish her to get Stanford in her third of the property if she chooses," is not a specific legacy of the slave to the wife, but only gives her the right to take him at a fair valuation; and if that valuation is more than her share, she must account for the surplus.

PETITION by the next of kin of Andrew Young against his administrator with the will annexed, for distribution, to which his widow was also made a party defendant, submitted to his Honor, *Judge Martin*, at RUTHERFORD, on the last circuit, upon the following case agreed:

Andrew Young died without children, leaving a paper-writing, which was duly admitted to probate as his last will and testament, in the words following, to-wit:

"January 8, 1833.

"I write these few lines to let all persons know that doing this murder is my own fault, and nobody's else; and I wish my dear wife to take it as easy as possible, and I wish her to get Stanford in her third of the property if she chooses, for she has raised him. I hope the rest won't be so ungenerous but to agree to it, as it is my wish. If I had to marry fifty times I don't want to have a better wife than she has been to me.

"Given under my hand and seal.

"ANDREW YOUNG. [L. S.]"

The said testator left a small estate, the one-third of which was not equal in value to that of the slave Stanford mentioned in the will. The petitioners, who were entitled as next of kin under the act of Assembly, insisted that the slave above mentioned was subject to distribution. The defendants insisted that Mary Young (the widow) was entitled to the slave under the will, although he was of a (361) greater value than one-third part of the estate. It was agreed by the parties that if the slave were not devised to the defendant, the widow, then he was to be sold for distribution; but if he did so vest by said bequest, that then the remainder of the estate only was to be distributed among the

petitioners. His Honor, *pro forma,* gave judgment for the petitioners, and the defendants appealed.

Pearson, for the defendants.
No counsel appeared for the plaintiffs.

DANIEL, J. This is a petition for distribution, filed by the next of kin of Andrew Young, deceased, against the administrator with the will annexed. The question submitted for the opinion of this Court is, whether the widow is entitled to the slave, Stanford, as a specific legacy under the will of her husband, Andrew Young. It is contended on behalf of the widow that if the Court should not construe the will as giving her the slave as a specific legacy, the whole will would be but a nullity, as there are no other legacies given, and the testator died without children. The law, they say, would give her one-third of his personal property. The words of the will creating the legacy are as follows: "I wish her" (his wife) "to get Stanford in her third of the property, if she chooses." After examining the whole will, it seems to us, and we so declare our opinion to be, that the testator intended that his wife should have but a third of his property, and that the slave, Stanford, did not pass as a specific legacy. The testator meant that the slave in question should, if the wife wished it, be taken by her in making up the payment and satisfaction of her third of the property. He thought, for the reasons given by him, that his wife would prefer a payment, or part payment, of her third of the property (not knowing the amount) by taking Stanford at valuation. He therefore gave her the power of taking him at a fair valuation. It is very likely that the testator expected that one-third of his property would be more in amount than the price of the slave, but it has turned out otherwise. The
(362) Court is of the opinion that in taking the account the widow may elect to have the slave at a fair valuation, and account to the administrator for so much of the valuation as shall appear to be above her *"one-third part of the property"* of the testator. The judgment below is affirmed, and this opinion will be certified to the Superior Court of law for the county of Rutherford.

PER CURIAM. Judgment affirmed.

JESSE CARTER v. GEORGE L. WILSON.

1. When a record from one State of our Union is declared on or pleaded in bar in another, the only proper plea or replication is *nul tiel record;* and that, both as to its existence and effect, is to be passed on by the Court upon inspection, and not by the jury.

2. What is the effect of an entry in the record of a suit in Virginia, that "by consent of the parties it is ordered by the Court that this cause be dismissed, and that the defendant pay to the plaintiff his costs by him in this behalf expended"? *Quære.*

THIS was an action brought on a covenant of soundness in a bill of sale for a slave sold by the defendant to the plaintiff. The defendant pleaded several matters, one of which was a former judgment in an action between the same parties, upon the same covenant, for the same damages, in the Superior Court of law for the county of Pittsylvania, in the State of Virginia. Upon the trial at CASWELL, on the last circuit, before his Honor, *Judge Norwood,* the jury was charged with all the issues joined on the defendant's pleas, including that of the former judgment; and to support it on the part of the defendant, he offered in evidence to the jury a transcript of the record of the Court in Virginia of an action of covenant upon the same, or a like covenant with that sued on in the present action, in which, after stating an issue joined on the plea of covenants not broken, it is set forth that "by consent of the parties it is ordered by the Court that this cause be dismissed and that the defendant pay to the plaintiff his costs by him in this behalf expended"; and it is further set forth that the defendant paid the sum of seven dollars and seventy-six cents, for the plaintiff's costs, taxed to (363) him in that suit. The counsel for the plaintiff moved the Court to instruct the jury that, in the absence of evidence of the law of Virginia, as to the nature and effect of the entry or judgment stated in the record from that State, it was the province of the jury to determine the same, as a matter of fact. The Court refused to give the instruction as prayed for; but directed the jury, that if they were satisfied that the suit in Virginia was upon the same subject-matter with the present, the transcript did show a former judgment in favor of the plaintiff, which barred his present action. The jury did not pass upon any other of the issues, but found

a verdict upon this alone—that there is a former judgment in favor of the plaintiff for the same cause of action as pleaded by the defendant; upon which there was judgment for the defendant, and the plaintiff appealed.

W. A. Graham, for the plaintiff, contended: I. That the Judge erred in not giving the instruction prayed. The law of a foreign State is matter of fact, to be decided by the jury. 2 Starkie Ev., 569; *Male v. Roberts,* 3 Esp., 163; *Clegg v. Levy,* 3 Camp., 166. This doctrine is not changed by the formation of our Federal Union, and the Act of Congress of 1790. That act declares in substance that a record of the proceedings of a court in one State, when certified according to its provisions, shall be received in evidence in a sister State, and entitled to the same faith and credit that it was in the State whence it was taken. But what "faith and credit" is given to it, in its own State, is not imparted by the record, but is open to inquiry and evidence. *Mills v. Duryce,* 7 Cranch, 481; *Hampton v. McConnell,* 3 Wheat., 234; *Mayhew v. Thatcher,* 6 Wheat., 129.

II. If the Court shall decide that the common law obtains in Virginia, the instruction given to the jury was wrong, as the entry determining the cause there does not import a judgment, which is a bar to a future action. A judgment is "the sentence of the law, pronounced by the Court upon the matter contained in the record," and consists of two parts: 1. A statement of the facts, either admitted by the parties (364) or found by a jury. 2. A formal entry of the decision thereupon. 3 Thomas's Co. Litt., 506 n. Here there was no statement of facts, having any reference to the judgment. Nor was there any formal entry of judgment, which is equally essential, for an entry of dismission is no judgment at law. *Banbury's case,* 3 Salk., 213. A dismission may be for insignificance. *Egerton v.* ————, 21 E. C. L., 420. Again, if it be a judgment, it must either be on a *nolle prosequi,* discontinuance, nonsuit, or retraxit. If either of the three first, the Judge was wrong, for neither of them is a bar to a future action. Nor is it a retraxit, for that implies an abandonment of the plaintiff's claim, acknowledged on the record; and this must unequivocally appear, by

the use of the terms *retraxit se* (withdraws himself), or others of the same signification. 3 Thomas's Co. Litt., 501.

It by no means follows, that because there has been a former suit between the parties, in which the same subject-matter was incidentally considered, a new action is barred. The true inquiry is, whether the point now in issue has been litigated and determined. *Seddon v. Tutop*, 6 Term, 607; *Godson v. Smith*, 4 E. C. L., 410.

3. The order in favor of the plaintiff for the recovery of costs can make no difference. Costs are merely collateral to the main controversy, and were not allowed by the common law when the forms of entries were settled and their effect determined.

J. W. Norwood, for the defendant.

RUFFIN, C. J., after stating the case as above, proceeded: The counsel for the plaintiff has insisted here upon the objection taken in the Superior Court; and also that the entry in the transcript is not such a judgment as bars a second action, but is only in the nature of a nonsuit. Upon the first point it is argued, that although the judgment of the Court of another State is conclusive evidence in this, yet it is so only as to those matters of which it is conclusive in the State in which it was rendered; of which our courts cannot take notice judicially, but that evidence is to be given (365) which, as in other cases of foreign law, must be submitted to the jury, as upon a question of fact.

Whatever difficulties the courts of one State may find as to the mode or means of ascertaining the effect of the orders, or the operation of the adjudications of the courts of another State, it is now deemed settled law that it is not the province of the jury. No issue can be made upon such a record which will bring that question before the jury. It may be that the courts must take judicial notice of the laws of the sister States to this purpose, and to this extent, aiding themselves with such lights from books, or the opinions of the professors of the law of the State from which the record comes, as they can obtain. It may also be that, from necessity, a new rule of evidence must be adopted, whereby testimony may be taken and addressed on this point to the Court, and not to the jury.

But since the case of *Mills v. Duryce,* 7 Cranch, 484, reviewed and affirmed in *Mayhew v. Thatcher,* 6 Wheat., 129, *nul tiel record* is the only plea or replication, when a record from another State is declared on or pleaded in bar; and it is put on the footing, not of a foreign judgment, but of that of a domestic forum. Upon that plea the Court, and not the jury, passes and judges upon inspection. The instruction prayed was therefore improper, in opinion of the Court. For the same reason, however, the whole proceeding upon the trial must be pronounced erroneous. The only issue passed on by the jury was that arising upon this plea of former judgment; and that was an issue not put to the country, but to the Court, and not adjudged in the record by the Court. The transcript sent to this Court does not set forth at large the plaintiff's replication; and we must therefore presume it to be the general one, according to the loose practice in which the profession will indulge themselves. To a plea of former judgment there may be two replications: the one *nul tiel record,* which is in the nature of the general issue; and the other, confessing and avoiding the record, and denying that it was for the same cause of action; or the plaintiff may new assign. 3 Chitty Pl., 1213, 1157, 929, note. *Seddon v. Tutop,* 6 Term,
(366) 607. The plea is, necessarily, that the two actions are for the same causes, and tenders an issue either upon the record or the identity of the cause of action. But the replication cannot take both issues, as that would make it double, but must be confined to one of them, and thus reduce the controversy to a single point, which can then be decided by the appropriate tribunal. In the case before us, if we could suppose the replication to have been upon the matter of fact, namely, that the actions were for different matters, the issue has been sufficiently found against the plaintiff, and the judgment should be affirmed. But we do not feel authorized by the course of practice, nor by what seems to have been the dispute on the trial, thus to tie down the plaintiff. The Court suppose that *nul tiel record* must have been replied. If so, the Court ought to have adjudged that there was, or was not, such a record, before the final judgment could properly be given, that the plaintiff should recover, or should take nothing by his writ. It is to be regretted that

the oversight occurred, because the exception states an opinion of the Court, as delivered to the jury, which would doubtless have led to a judgment of the Court upon that issue in favor of the defendant, and thus have directly brought to the review of this Court the true meaning of the transcript from Virginia, upon which this controversy may ultimately depend. The argument before us has been principally upon this point, and from the terms of this record the Court is made sensible how very unsatisfactory to ourselves would be any opinion we could form of the effect of such a proceeding in Virginia—upon which its efficacy here entirely depends. For the plaintiff it has been contended that it is not a recovery by him; nor is it a retraxit; but, if anything in the nature of a judicial sentence, that it is a nonsuit. The distinction between a nonsuit and a retraxit is very nice; and some respectable modern text-writers deem it now a question whether a judgment of the latter kind is, more than one of the former, a bar to a second action. 3 Chit. Pl., 930. But according to our notions in this State, it is not a judgment, either upon a nonsuit or a retraxit; for in each of them the plaintiff takes nothing by his writ, and the (367) defendant goes without day; while here, the plaintiff does take, upon the confession of the defendant, his costs of suit. But the incongruity is, that he recovers costs in a suit which is dismissed, instead of recovering nominal damages and costs, which would be regular in our law. The question is, whether, as the recovery was only of costs, and not of any of the damages laid in the declaration, the plaintiff is technically barred of those damages. In the present state of our information of the law of Virginia, and of the entries used in her courts, the Court would have some hesitation in pronouncing this to be or not to be a conclusive bar as a judgment. It appears rather to be a *concord* of record between the parties themselves, than an adjudication. Viewed in that light, perhaps the defendant will have less difficulty in availing himself of it, under another of his pleas—that of accord and satisfaction—than under the estoppel created by the record. However that may be, the question is not, at present, open for this Court; and the judgment of the Superior Court must be reversed, for the error already mentioned,

and the cause sent back, to have the issues made by the pleadings properly disposed of in the Superior Court.

PER CURIAM. Judgment reversed.

Cited: Knight v. Wall, 19 N. C., 129; *Carter v. Wilson, Id.,* 278; *Moore v. Gwynn,* 27 N. C., 190; *Trice v. Turrentine,* 35 N. C., 215, 216.

AARON O. ASKEW v. HEUSTED REYNOLDS.

1. If, in answer to the *prima facie* evidence of fraud arising from the possession retained by a debtor after a conveyance of his slaves, his assignee produces proof tending to show the debtor's possession was *bona fide*, as his bailee or agent, the creditor may give in evidence to rebut such proof, the acts and declarations of the debtor showing that he claimed the slaves as his own after his conveyance.

2. Where a person alleging himself to be the agent of another, sold a note payable to his principal for the benefit of his principal, what he said to the purchaser at the time of the sale, as to the note belonging to his principal, and his being merely an agent, is admissible evidence.

TROVER, for two slaves, tried at BERTIE, on the (368) Fall Circuit of 1834, before his Honor, *Judge Strange.*

The plaintiff, in support of his title, proved that the slaves once belonged to Holt Hotchkiss; that Hotchkiss, by a deed, bearing date 7 October, 1828, conveyed them to Abram Hoadley; and that Hoadley subsequently conveyed them to him, the plaintiff. The defendant claimed title under a judgment and execution against Hotchkiss, and showed a judgment against him at May Term, 1829, of Bertie County Court, on which a *fi. fa.* issued, returnable to the ensuing August Term, which was in part satisfied, and another *fi. fa.* issued from that term, upon which the slaves were taken and sold, and the defendant became the purchaser. The defendant then alleged that the deed from Hotchkiss to Hoadley was fraudulent, and in support of the allegation proved that Hotchkiss retained possession of the slaves, after the date

of the deed, until June or July, 1829, when the sheriff went to levy the execution upon them. To rebut this testimony the plaintiff offered evidence to account for the possession of Hotchkiss, which was left to the jury. The defendant then offered to prove that, subsequent to the deed from Hotchkiss, he, Hotchkiss, claimed the slaves as his own, and offered to mortgage them to secure a sum of money which he wished to borrow. This evidence was rejected by the Court. The plaintiff then, to show that Hotchkiss was indebted to Hoadley, proved that Hoadley was the holder of a note made payable to him by one Wilson; that Hotchkiss brought the note to one Josiah Holley, a few months before the conveyance of the slaves was made to Hoadley, and sold it to him, saying, at the same time, that he claimed no interest in it himself, but was acting merely as the agent of Hoadley; that the note was payable to Hoadley, and without indorsement; and that Holley paid to Hotchkiss the value of the note. The declarations of Hotchkiss to Holley, when the note was sold, were objected to as inadmissible evidence, but were received by the Court. The plaintiff had a verdict, and the defendant moved for a new trial, upon the ground that the declarations of Hotchkiss subsequent to his deed to Hoadley, were improperly rejected, and that what he said to Hol- (369) ley was improperly received. The motion for a new trial being refused, the defendant appealed.

Badger, for the defendant.
Iredell, contra.

GASTON, J. This was a controversy between a purchaser at execution sale, representing a judgment creditor, and a purchaser from an assignee of the debtor, whether the transfer of the debtor was fraudulent and void as against the creditor. There are cases in which the legal conclusion of fraud is inferred directly from certain acts, but there are many others in which it cannot be inferred, without an inquiry into the purposes for which those acts were committed. It was once supposed that when a debtor made an absolute transfer of chattels, and retained the possession, the intent to hinder and delay creditors appeared so conclusively upon the face of the transaction that an inquiry into the actual

intention of the parties was unnecessary and unavailing. It was held, that in judgment of law it was a fraud in the parties to pass the apparent title from the debtor, while he was permitted to have the use and enjoyment of the subject-matter of the pretended transfer. This doctrine has been so far overruled as to allow explanations to be made to repel this inference of unlawful interest. But such a repugnance between the transfer and the possession yet raises the presumption of a secret trust for the benefit of the grantor, which, while it admits, also requires an explanation, and which, unexplained, or not satisfactorily explained, establishes the fraud. The possession of the slaves, having in this been retained by the debtor, for eight or nine months after the execution of his bill of sale, was sufficient to impress upon the transaction the character of a fraudulent transfer, unless, from other facts and circumstances, another character could clearly be assigned to it. The plaintiff offered evidence tending to remove the legal presumption and to establish an actual *bona fide* intention, which was properly submitted to the jury. The evidence is not set forth in the *case* made, but it must have tended to show that the debtor
(370) retained the possession, as the agent or bailee of the purchaser. The *nature* of that possession *then* became an important inquiry. Was it *in truth* a possession as the agent or the bailee of the purchaser, or *colorably* only as such, and actually as the beneficial temporary or permanent owner? If the first, the apparent repugnance between the title and the possession might be explained and honestly accounted for; but if the second, then such colorable possession was but part of the machinery of the fraud.

This Court is of opinion that, upon this inquiry, the evidence offered by the defendant, and rejected below, was competent and proper. Generally, the acts or declarations of a grantor, after the conveyance made, are not to be received to impeach his grant. The rights of the grantee ought not to be prejudiced by the conduct of one who at the time is a stranger to him and to the subject-matter of those rights. But the acts and declarations rejected in this case were those of the possessor of the property— were connected with that possession, and formed a part of its attendant circumstances. They were collateral indications of the nature, extent, and

purposes of that possession. They were to be admitted, not because of any credit due to him by whom they were done or uttered, but because they qualified and characterized, or tended to qualify and characterize, the very fact to be investigated. Their admissibility, and their effect when admitted, were very different questions. They seem to us to come within the principle which permits the declarations of a trader, at the time of leaving his place of residence, to be admitted as evidence of the purposes of his departure; and which, on a question of adverse possession, receives the acts and declarations of the occupant as indicative of the dominion claimed and exercised over the property. The very point before us occurred in the case of *Willies v. Farley,* 14 E. C. L., 366, and was there determined in conformity with this opinion.

The exception taken by the defendant to the evidence received, in relation to the sale of the note to Holley, and the circumstances accompanying it, is considered by the Court as unfounded.

For the first error assigned, the judgment is re- (371) versed, and a new trial ordered.

PER CURIAM. Judgment reversed.

Cited: Patton v. Dyke, 33 N. C., 239; *Foster v. Woodfin,* 33 N. C., 342; *Marsh v. Hampton,* 50 N. C., 383; *Foust v. Trice,* 53 N. C., 495; *Thompson v. Matthews,* 61 N. C., 17; *Cheatham v. Hawkins,* 76 N. C., 339; *Headen v. Womack,* 88 N. C., 471; *Brown v. Mitchell,* 102 N. C., 375; *Clement v. Cozart,* 112 N. C., 420; *Bank v. Levy,* 138 N. C., 277.

JOHN DOUGHERTY v. WILLIAM STEPP.

Every unauthorized intrusion into the land of another is a sufficient trespass to support an action for *breaking the close*, whether the land be actually enclosed or not. And from every such entry the law infers some damage; if nothing more, the treading down the grass or shrubbery.

TRESPASS QUARE CLAUSUM FREGIT, tried at BUNCOMBE, on the last circuit, before his Honor, *Judge Martin*. The only proof introduced by the plaintiff to establish an act of trespass was, that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain-carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This, his Honor held not to be a trespass, and the jury, under his instructions, found a verdict for the defendant, and the plaintiff appealed.

Mendenhall, for the plaintiff, contended, that every unwarrantable entry on another man's soil is considered a trespass by *breaking his close;* for that in contemplation of law every man's land is separated and set apart from his neighbor's by either a material or invisible and ideal boundary, and that every entry carries with it some damage—if no other, the treading down and bruising the herbage and shrubbery. That whenever a man has a *right to enclose his estate,* by a real substantial fence, the law regards it as already enclosed against the unauthorized intrusion of his neighbor. In illustration and support of these positions, he cited 3 Bl. Com., 209. 6 Bac. Abr., 581, title *Trespass. McKenzie v. Hulet,* 4 N. C., 613. Hammond's N. Prius, 151, 152. Dyer, 225, *b.* pl., 40.

No counsel appeared for the defendant.

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RUFFIN, C. J. In the opinion of the Court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle that every unauthorized, and therefore unlawful, entry into the close of another, is a trespass. From every

such entry against the will of the possessor the law infers some damage; if nothing more, the treading down the grass or the herbage, or as here, the shrubbery. Had the *locus in quo* been under cultivation or enclosed, there would have been no doubt of the plaintiff's right to recover. Now, our Courts have for a long time past held, that if there be no adverse possession, the title makes the land the owner's *close*. Making the survey and marking trees, or making it without marking, differ only in the degree, and not in the nature of the injury. It is the entry that constitutes the trespass. There is no statute, nor rule of reason, that will make a wilful entry into the land of another, upon an unfounded claim of right, innocent, which one, who set up no title to the land, could not justify or excuse. On the contrary, the pretended ownership aggravates the wrong. Let the judgment be reversed and a new trial granted.

PER CURIAM. Judgment reversed.

STATE v. NICHOLAS L. WILLIAMS.

1. The Act of Congress of 1825, ch. 275, sec. 35, exempting postmasters from serving on juries, is constitutional; and those officers cannot be compelled to serve as jurors on the original panel in the State courts. Though *it seems* that they would not be so exempted when called as tales-jurors.

2. An appeal lies from a judgment of the Superior Court, ordering a postmaster to be fined for not serving as a juror.

THE defendant was summoned as a juror on the original panel to the last term of the Superior Court of Law for SURRY County; when he appeared in open court before his Honor, *Judge Martin*, alleged that he was a postmaster under the authority of the United States, and (373) claimed an exemption from serving on the jury under an act of Congress. His Honor deemed the cause shown insufficient, and upon the defendant's refusing to serve, ordered him to be fined twenty dollars; and he thereupon prayed and obtained an appeal to the Supreme Court.

Pearson, for the defendant.

The Attorney-General, for the State, objected that the judgment below was for a fine for contempt, and could not be appealed from.

GASTON, J. Upon this appeal the only question presented is, whether a postmaster is exempt from serving as a juror on the original panel. The Act of Congress, 1825, ch. 275, sec. 35, declares this exemption in explicit terms. If the postmaster has it not, it must be because this provision of the act is not warranted by the Constitution of the United States, and is therefore null. The Attorney-General has declined to take that ground here, and we must therefore consider it as virtually abandoned. We think that it has been properly abandoned. Under the authority *"to establish post-offices,"* Congress can rightfully require of the postmasters to devote their time and attention to the execution of their appropriate duties, and by such an exemption to secure them against compulsory interruptions in the performance of these duties. Were the exemption given as a personal privilege, it would present a different inquiry. But we do not so regard it. Respect for the constituted authorities of the general government, and a due sense of the necessity of harmony between the institutions of the United States and the municipal regulations of the individual States, forbid such an interpretation, except it were unavoidable.

It may not be improper to remark that our decision does not apply to the case of a postmaster who shall be called on as a by-stander to make up a jury. Should he have official engagements demanding his attention, upon making this known to the Court, it ought, and would, no doubt, excuse him. But the fact of his being a by-stander furnishes a presumption that the duties of his office leave him then at leis-
(374) ure to perform those which, in common with other freeholders, he owes to the State—to aid her in the administration of justice.

The Attorney-General has objected that the judgment below was conclusive, and that no appeal lies therefrom. This objection is not tenable. The judgment below was on a matter of right, and not of discretion, and the party aggrieved thereby can, under the broad terms of the acts defining the

jurisdiction of this Court, insist on the legality of that judgment being examined into here. An appeal in a case of precisely this character was entertained without objection in *State v. Hogg,* 6 N. C., 319; s. c., 4 N. C., 684.

It is the opinion of this Court that the judgment below is erroneous, and that a certificate to this effect be sent to the Court below.

PER CURIAM. Judgment reversed.

Cited: S. v. Whitford, 34 N. C., 101; *S. v. Willard,* 79 N. C., 661.

STATE v. JOHN CALHOON.

1. The Superior Court may amend the record of its proceedings at any time during the same term; and may thus obviate any objections made to the record of that term.

2. The Supreme Court upon an appeal cannot consider of any objections to the record of the Court below that do not appear in the transcript sent up.

3. *It seems* that the signing the name of the foreman to the endorsement of "a true bill," on a bill of indictment, though a salutary practice, is not essential to its validity. But whether this be so or not, a variance between the name of the foreman, as appearing upon the record of his appointment, and his signature upon the bill, is immaterial, for his identity must necessarily be known to the Court, and the receiving and recording the bill with his endorsement establishes it.

THE defendant was convicted of murder at GUILFORD, on the last circuit, and on his behalf a motion was made in arrest of judgment. It is stated in the transcript to have been founded on the following reasons: 1. That "the caption of the record of the sitting of the Court was not written in full, the entry on the minutes being 'October Term, 1835: Present, the *Hon. William Norwood, Judge.*'" 2. That "the name of the prisoner, *John Calhoon,* was incorrectly (375) spelt *'John Calhoun'* on the minutes of the trial"—as to which it is stated in the transcript that by order of the Court at the time of the motion the minutes were corrected, so as to make the spelling of the prisoner's name there the

same with that in the indictment to which he answered upon his arraignment. 3. That one Charles W. Peeples was appointed the foreman of the grand jury, as appeared by the record; but that he did not sign the bill, but one "*Chas.* W. Peeples." The transcript then states that, upon inspection of the record, his Honor, *Judge Norwood,* found the two first reasons to be, in fact, untrue; and deeming the third insufficient in law, overruled the motion, and passed sentence of death on the prisoner, from which he appealed.

Nash, for the prisoner.
The Attorney-General, for the State.

RUFFIN, C. J., having stated the case as above, proceeded: Whatever foundation in truth there may have been for the allegations of fact, contained in the two first reasons, at the time they were offered in the Superior Court, there is none now. In the transcript sent up, the prisoner's name appears the same throughout; and the term of the Court, as established by law, to have "begun and held on the fourth Monday after the fourth Monday of September, etc., at the courthouse," etc. If the allegations of the prisoner were true at the time, and the record had been so made up, and brought in that state under revision, the objections would have been open to be taken. But whether valid or invalid, they do not exist now. Indeed, it seems perfectly ridiculous to move a court then sitting, at the proper time and place, not to render judgment, because its record did not show it to be thus sitting, or because the clerk had misspelled the prisoner's name in one entry, although in the very motion he admits his identity with the person indicted, tried, and convicted. The suggestions deserved the thanks of the Court; but the only proper answer to them, as objection, was to correct the mis-
(376) prisions of the clerk, and thus remove them. At all events, this Court must say that they are not true now. We can look only to the transcript of the record, as made up, which is sent to us.

Upon the third ground, the opinion of this Court agrees with that of his Honor. It is the practice for the foreman to sign his name to the finding of the grand jury; and it seems to be a salutary practice, as it tends to the more com-

plete identification of the instrument containing the accusation. We do not know in what it had its origin; but though useful and proper, it does not seem to be essential, nor to have been, at any time, the course in England. The indorsement there is merely *"billa vera,"* or "true bill." 1 Chit. Cr. Law, 324. 4 Bl. Com., 306. That indorsement becomes part of the indictment, and makes the accusation complete. Yelv., 99. But it is never set out in the enrolment of the record, which states the grand jury, and that they were sworn to inquire, etc., and that "it is upon their oath presented, that," etc. 4 Bl. Com., *Appendix.* It is the grand jury's returning the bill into Court, and their publicly rendering their verdict on it, in the form "a true bill," and that being recorded or filed amongst the records of the Court, that makes it effectual; in the same manner that the like proceedings operate in the case of a verdict of the petit jury. This was intimated by *Chief Justice Henderson,* in *State v. Collins,* 14 N. C., 117. But whether the position be correct or not, that case and *State v. Kimbrough,* 13 N. C., 441, are direct authorities against this objection. For if the foreman must put his name on the bill, the variance in the manner of his spelling it, from that of the clerk's, is immaterial. The Court in which the juror was acting must necessarily know his identity; and the receiving and recording the bill with his indorsement establishes it.

Wherefore the opinion of this Court is, that the judgment of the Superior Court is not erroneous; which must be certified to that Court, in order that the sentence of the law may be duly executed.

PER CURIAM. Judgment affirmed.

Cited: S. v. Cox, 28 N. C., 446; *S. v. Guilford,* 49 N. C., 85; *Thornburg v. Mastin,* 93 N. C., 263; *S. v. Harrison,* 104 N. C., 731; *S. v. McBroom,* 127 N. C., 529.

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STATE v. THOMAS M. D. REID.

1. An exception, or the case stated for an appeal to the Supreme Court, is there taken to be absolutely true as to all matters which occur on the trial or purport to have been acted in the court from which the appeal comes. But where the fact is stated as having occurred in another court, the record of that court is the only competent evidence of the fact; and no statement contrary to it can be admitted.

2. Although one court cannot take any *posterior* action in a cause after it has been removed to another for trial, yet it may afterwards amend by supplying an omission in the record which occurred prior to the order of removal; and may then send a new transcript of the amended record to the court to which the cause was removed.

3. Upon the suggestion of a diminution of the record, the defects alleged may be supplied by sending a new transcript, or by making insertions in that before sent; and, in the latter case, if the proper officer make the insertions from a memorial containing the facts omitted, it is no objection that he had not the record of the whole proceedings present.

4. The supplying defects in a transcript, either by procuring a new one or by making insertions in that already sent, is not an *amendment* of the court to which it is sent.

THE defendant was convicted of forgery at CHATHAM, on the last circuit, before his Honor, *Judge Norwood,* when his counsel submitted a motion in arrest of judgment, under the following circumstances:

The record showed that the indictment on which the prisoner was tried was found in the Superior Court of Moore, at August Term, 1833; that he was arraigned thereon, and pleaded not guilty, at February Term, 1834; and that at the same term an order was made, upon the affidavit of the prosecutor, to remove the trial to Chatham. The record further stated, that at August Term, 1834, the Court of Moore took the recognizance of the accused for his appearance at the then next succeeding term of Chatham Court, and again ordered the clerk to transmit a full transcript of the record of the cause, and of all proceedings had therein at that Court, to the next Court of Chatham. The foregoing was the purport of the transcript from Moore, dated 17 September, 1834, as the same is copied into the transcript from Chatham, sent up to the Supreme Court.

But appended to the record from Chatham, and forming part of the transcript, is a statement made by the Judge who tried the cause, in which it is set forth, (378) that the prisoner had not pleaded in Moore, when the order of removal was made in February, 1834, but was taken by a capias, at August, 1834, and then put in his plea, and the same was entered *nunc pro tunc,* as of the preceding term; all which proceedings at August, 1834, were had after the first order of removal, and after a transcript from Moore had been filed in Chatham. The record from Chatham also contains a copy of a transcript from Moore, dated 11 March, 1834, which corresponds with that before mentioned, bearing date 17 September, in all respects, except that it omits the prisoner's plea, in stating the proceedings of February Term, and, of course, comes no later down than that term.

The Judge further states, that previous to the prisoner being put on his trial, the Solicitor-General suggested a diminution of the record, in respect of the prisoner's plea, and moved for a *certiorari* to obtain a more full transcript, which was granted. The prisoner agreed, that it need not issue, as the Clerk of the Court of Moore was then present, and might act without the writ. Thereupon the clerk, at the instance of the Solicitor-General, proposed to insert in the transcript the plea of not guilty, as of February Term, 1834, taking the same from his trial docket, which he had then in Court, but at the same time stating, that he had not with him the whole record. To that the prisoner's counsel objected, upon the ground that the transcript could not be amended by anything but the record itself, in which all the proceedings were spread out. The Court ordered, that the amendment might be made, reserving the question of its legality.

The reasons for the motion in arrest of judgment were: 1. Because the case had been improperly removed before plea by the prisoner. 2. Because the Court of Moore had put the defendant to his plea and entered it, after the cause had been removed to Chatham, and was pending there. 3. Because the transcript from the Court of Moore, filed in the Court of Chatham, was allowed to be amended in Court, without having the whole original record there. His Honor

(379) arrested the judgment, and the Solicitor-General, for the State, appealed.

The *Attorney-General,* for the State.
Nash, for the defendant.

RUFFIN, C. J., after stating the case as above, proceeded: It may be true that a cause cannot be removed for trial before it is at issue; since the object of removal is to have an impartial jury, and, before an issue of fact, it cannot be known that the trial will be by a jury. It is certainly true that after a cause has been removed from one court to another, and is well constituted in the latter, there can be no further proceedings in the former. The jurisdiction cannot exist in both, and that of the court to which it is removed attaches and necessarily ousts that of the court which had it originally. *Murray v. Smith,* 8 N. C., 41. The question is, when did the jurisdiction of the Court of Chatham attach? If the first order of removal of February, 1834, was made before plea, and therefore was premature, it was inoperative, and did not transfer the jurisdiction, but the cause remained in Moore. For while both courts cannot have the jurisdiction at the same time, much less the cause itself before them, it must, nevertheless, be in one of them. It continues where it began, until it is effectually gained by the other. The order of removal, if improper, and the filing of the transcript, does not create the jurisdiction; and the trial must still be had in the first county. *State v. Poll,* 8 N. C., 442. The obligation of the court in which the indictment was found, to try it, does not depend upon the cause being sent back to it, for there is no power thus to remit it. It was never removed. If this be true, the plea, if made and entered at August, 1834, in Moore, was then and there properly demandable; and the removal to Chatham was by force of the new order of that term, and not that of the preceding term. Under that order the transcript of 17 September was filed, which sets out the plea and both orders of removal, and thus answers both of the two first reasons in arrest of judgment.

(380) But the Court is not disposed to put the case on that ground. It is probably not the truth. The last

transcript states the plea at February, 1834, and an order at that term for removal. In that state of the case the subsequent proceedings in Moore, at August, 1834, were *coram non judice,* for the reasons already given; the cause was in Chatham Court.

It is, however, insisted, and the case states it as a fact, that the plea was not entered at February, but at August, *nunc pro tunc;* and, supposing that the removal may be before issue joined, it is then contended that the Court of Moore could not make such an order, and, consequently, that the prisoner has never yet pleaded.

The first observation upon these positions is, that a fact is assumed in them which is inadmissible. The record from Moore does not state an amendment, nor an order for its being made *nunc pro tunc.* The plea purports, as therein stated, to have been in fact pleaded at February, 1834, and to have been in fact recorded then. An exception, or the case stated for an appeal to this Court, is here taken to be absolutely true as to all matters which occur on the trial, or purport to have been acted in the court from which the appeal comes. But here the fact is stated as having occurred in another court. That can appear by the record of that other court only. It necessarily forms a part of the transcript sent here, and it does not show the fact, but the contrary. The record was conclusive upon the Superior Court, *as to its contents,* as it is also upon this Court. A statement of the proceedings of Moore Court inconsistent with, or not supported by, those contents, cannot control them. Such a statement is altogether useless in a case of this sort; for on a motion in arrest of judgment we cannot travel out of the record, technically speaking. The order for the amendment, if made, was not sent to Chatham as part of the record, and no other evidence was competent to establish it. *Reid v. Kelly,* 12 N. C., 313.

But the Court is clearly of opinion, if the cause were well constituted in Chatham by the first order of removal (made before the plea was recorded), and if the order for the amendment, as well as the amendment itself, had (381) been inserted in the record and sent forward in a new transcript, that yet the trial in Chatham would be proper, and the record, with those additions, would have been suffi-

cient. It is true that, after a cause has been transferred from one court to another, whether by appeal or change of venue, the court from which it has gone cannot proceed further in it. Whatever *purports* to be *posterior* to the loss of jurisdiction is, therefore, erroneous, and probably void. But the principle extends no further. When the action of the court is not a subsequent adjudication, nor anything preparatory to an adjudication to be had in that court, but relates to what was done in the cause while in that court, there is a plain difference. No usurpation of authority then appears. The act purports to have been done while the court had jurisdiction; and as to the point of fact, the statement cannot be questioned by any other court. Every court is the exclusive judge of its own records, and is competent to make them speak the truth as to its own proceedings. Hence, it is the constant course that orders for amendments by the inferior court are allowed after appeal or writ of error, and the transcript in the Superior Court made conformable. Tidd's Practice, 770; *State v. Cherry,* 13 N. C., 550; *Ballard v. Carr,* 15 N. C., 575. Such amendments *nunc pro tunc* are not open to inquiry in another court, either as to their propriety or as to the periods at which they are made. *Mellish v. Richardson,* in the House of Lords, 9 Bing., 125; *Bright v. Sugg,* 15 N. C., 492. They are supposed to speak the truth, and to make the record what it was intended it should be. Where the amendment is to supply an omission of the officer, it is, of course, upon satisfying the Court that there has been an omission. Justice would be defeated without it. If a prisoner plead *ore tenus,* and the clerk fail to record it before the jury be sworn or render their verdict, surely the Court may have the record completed. So of the case before us. The matter said to be inserted purports to be a proceeding in the cause before any order of removal. It cannot be supposed that the Court would have inserted the statement in the record if the prisoner did not plead
(382) at February. But it must be supposed that he did, and that the officer neglected to record it; and therefore the Court afterwards did it in conformity with the truth.

The last reason is founded on the amendment, as it is called, that was made in Chatham. That is not an amendment of the record in any sense of the term; but a mere correction of

the transcript, so as to make it a copy of the record of the Court of Moore. It is the duty of the Court to use all the means in its power to get the transcript perfect—that is, a true copy—and not to allow either party to suffer from its inaccuracy. When the statute authorizes a trial on a transcript, it is presumed that the clerk will give the tenor of the record. But he may not; and if either party, upon affidavit or otherwise, to the satisfaction of the Court, suggests a diminution, the case is not allowed to proceed further until it be ascertained that what is before the Court professing to be a transcript is really so. That is usually done by a *certiorari,* which recites the diminution and commands the officer to certify a full and perfect transcript. A second transcript will be satisfactory, if not objected to by either party; for it is then presumed to set out the whole. It is no cause of complaint that the transcript was made out from the proceedings *in paper* instead of taking it from the *roll,* provided there be no omission in the transcript and it contains no more than the record itself does. The want of truth is the only suggestion that can authorize the Court to require another transcript or the alteration of that before sent. If that suggestion be made a second time, or oftener, and the Court sees reason to think the transcript defective, it may order other writs of *certiorari* to issue; but whenever a transcript shall be returned, to the truth of which there is no objection on either side, the Court must deem that a correct one, and proceed on it accordingly. Instead of issuing a *certiorari,* the Court may in extraordinary cases require the officer to bring the original record into court and have the transcript taken therefrom or the former one corrected. It is not seen that it is indispensable to do so in any case but that in which two transcripts have already been filed which are *contradictory* to each other, and the parties still dispute (383) which is correct. As the Court cannot determine that point but by reference to the original, it must be resorted to. But this is unnecessary where the one transcript is not contradictory, but only more full than the other and supplies its omissions, or where there is no suggestion that the one which purports to be more complete is still defective or in any respect untrue. *State v. Collins,* 14 N. C., 117. The inquiry in such a case is not into the propriety of acts of the

court from which the record comes, but whether the officer of that court has truly stated in his copy those acts. The defects alleged may be supplied by sending a new transcript, or by insertions in that before sent. If in the latter way, it is not the act of the Court, by way of amendment, any more than in the former. It is in each case the act of the officer under the mandate of the writ for a full transcript.

It is supposed that the objection refers to an addition allowed to be made to the transcript of 11 March, 1834 (which did not set out the plea), under the idea that the cause was effectually removed by the order of February; for the second one, of 17 September, did contain the whole proceedings. For the reason before given, the latter transcript might have been proceeded on, so far as it professes to be the record of the proceedings before the order of removal. But there could be no reason why the same matter should not be inserted in the previous transcript. There was no further suggestion of diminution, no contradiction between the transcripts, no application of the prisoner, either before or after conviction, for the original record as being necessary to correct actual errors in the transcript. The objection was, that the clerk could not be allowed the aid of that part of the memorial kept by him, which contained the omitted matter, to make his copy true—admitting at the same time that thereby he did make it true. The Court deems it altogether untenable, and is of opinion that there is enough in the record to warrant judgment for the State, which must
(384) be certified accordingly, that the Superior Court may proceed to render it.

PER CURIAM. Judgment reversed.

Cited: Stewart v. Garland, 23 N. C., 472; *S. v. Craton,* 28 N. C., 167; *S. v. Munroe,* 30 N. C., 259; *S. v. Barfield, Id.,* 353; *S. v. Swepson,* 81 N. C., 576; s. c., 83 N. C., 589; s. c., 84 N. C., 828; *S. v. Haywood,* 94 N. C., 852; *S. v. Gooch, Ib.,* 985; *Walton v. McKesson,* 101 N. C., 436; *Fisher v. Mining Co.,* 105 N. C., 124; *Lowe v. Elliott,* 107 N. C., 719; *S. v. Flowers,* 109 N. C., 845.

ABRAM BRYAN v. WILLIAM B. WADSWORTH.

1. A petition filed in the County Court, praying permission to emancipate a slave "at such time as the owner may think proper," and a decree of the Court granting such permission, upon the owner's "complying with the directions of the acts of the General Assembly in such cases provided," is not a valid act of liberation within the purview of the Acts of 1777 (Rev., ch. 109) and 1796 (Rev., ch. 453), where no other proceedings appear upon the records.

2. The giving the bonds required from the owner of a liberated slave, and filing them in the County Court, forms no part of an act of emancipation, and will not aid a defective act of liberation, under the Acts of 1777 and 1796.

3. *It seems* that to constitute an act of liberation, entered of record under the Act of 1796, it is only necessary that there should be a petition filed, making the proper allegations, and expressing the desire of the owner *then* to confer freedom upon his slave, and praying permission so to do; and that the Court should, by a proper adjudication, grant the permission so prayed for.

TRESPASS VI ET ARMIS, brought by the plaintiff to try his right of freedom. The defendant pleaded that the plaintiff "Abram is the proper slave of the defendant, and that he cannot maintain an action."

Upon the trial at CRAVEN, on the last circuit, before his Honor, *Judge Donnell,* the following facts were admitted: The plaintiff was originally the slave of one Elizabeth Henry of the county of Craven, who, at the March Term, 1808, of the County Court, filed the following petition, to-wit: "To the Worshipful, the Justices of Craven County Court: The petition of Elizabeth Henry respectfully showeth, that she is possessed of the following slaves, whose meritorious services she desires to reward with the blessing of freedom, viz." (here follows the names of several slaves, among whom is the plaintiff Abram). "She prays that she may be permitted to emancipate the said slaves at such time as she may think proper." On the records of the Court, at the same term, appeared the following entry: "Read the petition of Elizabeth Henry, praying permission to eman- (385) cipate" (the slaves named in the petition) "for long and meritorious services. Ordered that the petitioner have the permission prayed, upon complying with the directions of the acts of General Assembly in such cases provided."

On 11 June, 1808, the said Elizabeth Henry and John C. Stanly, as her security, signed, sealed and delivered two penal bonds, one of which was payable to Benjamin Williams, Governor of the State of North Carolina, for the sum of two hundred pounds, conditioned as follows: "The condition of the above obligation is such that, whereas, at the Court held for Craven County, at this day, permission has been granted to Elizabeth Henry by the said Court to emancipate and set free a certain negro slave named Abram: now, if the said negro so permitted to be liberated shall, during his residence in the State of North Carolina, behave himself as an honest and peaceable citizen, then the above obligation to be void." The other of said bonds was payable to John Tillman, Esq., chairman of Craven County Court, for the sum of one hundred pounds, conditioned as follows: "The condition of the above obligation is such, whereas, at the Court held for Craven County, at this day, permission has been granted to Elizabeth Henry by the said Court to emancipate and set free a certain negro slave named Abram: now, if the said negro so permitted to be liberated shall not become chargeable to the parish of Craven County, or of any other county of this State, then the above obligation to be void." These bonds were filed in the office of the Clerk of Craven County Court and were now among the records of said Court. The present plaintiff was the slave mentioned by the name of Abram in the petition of Elizabeth Henry and in the order or judgment thereon and in the bonds aforesaid.

The plaintiff, before and at the time of filing the petition above mentioned by Elizabeth Henry, and obtaining the order or judgment thereon, and afterwards, until 4 January, 1820, was and continued in the possession of the said E. Henry, and during the whole of that time she claimed and held him as her slave, and exercised control over him as his
(386) mistress and owner. To some of the slaves mentioned in the petition the said Elizabeth Henry executed and delivered deeds of manumission (though she still continued in the actual possession of them); but to the plaintiff, Abram, she made no such deed, nor did any act (except the proceedings as above stated), whereby to express her determination to liberate him; but, on the contrary, on 4 January, 1820, she for a valuable consideration duly sold and delivered him

to one Thomas Wadsworth, from whom the defendant purchased him, in whose possession he continued until the bringing the present action. Upon this statement of facts his Honor, *pro forma,* rendered a judgment for the defendant, and the plaintiff appealed.

W. C. Stanly, for the plaintiff.
Badger and *J. H. Bryan,* for the defendant.

GASTON, J. We are of opinion that there is no error in the judgment below. Upon the facts stated in the case agreed it was correctly decided that the plaintiff was *not* a freeman, but was the slave of the defendant. The manumission of a slave is the act of the owner. His power to perform this act is, by various statutes, restrained and regulated, but it has not been taken from him and conferred on a judicial tribunal. In our Act of 1777 (Rev., ch. 109) it is recited that an evil and pernicious practice had prevailed of setting slaves free, which, at that critical juncture, ought to be guarded against. The evil intended to be redressed was the too frequent and indiscreet emancipation of slaves by their owners. The remedies provided by the act (following very closely the enactments of the Colonial Act of 1741, Martin's Rev., ch. 24, sec. 56) were: first, that no slave should *be set free* except for meritorious services, to be adjudged of and allowed by the County Court, and license first had and obtained thereupon; and, secondly, that every slave who should "be set free by his master or owner otherwise than is so directed" should be seized and sold for public purposes. The act of setting free is regarded by this statute as the act of the master. If he performs it otherwise than in the mode therein prescribed, he forfeits his slave to the community, (387) and the manumission is invalid. The license is a permission to do the act, and this permission the Court is authorized to grant when it shall have adjudged that the slave has performed extraordinary services meriting the boon which the master desires to bestow. The adjudication and the license do not *constitute* the manumission; they only legalize it. There is no subsequent statutory provision which in the slightest degree changes the relative powers of the mas-

ter and the Court. The words of the Act of 1796 (Rev., ch. 453), which have been relied on in argument, when fairly construed, affect no alteration in this respect. It is entitled "An act to *amend, strengthen* and *confirm* the several acts of this State against the emancipation of slaves." It would be somewhat extraordinary if, under such a title, we were to meet with enactments extending the authority of the courts in granting emancipations or abridging the power of masters to withhold it. This act repeats the prohibition to set a slave free in any case, or under any pretense except for meritorious services, to be adjudged of and allowed by the Court, and on license first had and obtained therefor, and then further enacts that "such liberation, when entered of record, shall vest in the slave so as aforesaid liberated all the right and privilege of a free-born negro." It cannot be held to amend the former statutes, unless it be in requiring that the liberation should be of record, and in declaring the effect of the liberation to be an admission of the freedman to the right only of those of his color born out of slavery. But it has been asked, if the adjudication and the license do not constitute the liberation, how is such liberation to appear of record? No mode is prescribed for recording the act which the master may thereafter perform. We answer, in the first place, that if a subsequent act be *necessary* in order to evince the master's exercise of the license granted, it may be entered of record, because the statute requires, and of course authorizes, the liberation to be recorded. But when the ordinary course of proceedings in these cases is attended to—and which mode, we have no doubt, was that in the contemplation of the Legislature—there needs nothing more to show the act of
(388) the master than his petition, which is a part of the record of the proceedings of the Court. This petition usually sets forth that the petitioner is the owner of the slave; that the slave has rendered such meritorious services as to deserve the boon of freedom; that he desires *then* to confer it, and prays that he may be permitted so to do. The Court proceeds to examine the subject-matter of the petition, adjudges that the meritorious services have been performed, and grants the permission prayed for. These, entered of record, make the liberation required by law. The master sets free,

so far as he can set free by this solemn declaration of his wish that the shackles of bondage be forthwith removed, and the competent authority assents to this liberation. The slave is *then* freed by his master under the license of the Court.

The petition upon which the County Court acted in this instance is of a very extraordinary character. It represents that the petitioner is possessed of sundry negro slaves (among whom is the plaintiff) whose meritorious services she desires to reward with the blessing of freedom, and prays, therefore, "that she may be permitted to emancipate them *at such time as she may think proper.*" It pretends not to set them free so far as the petitioner has power to liberate; it asks not that they be then freed, but rather solicits a power over them, through the instrumentality of the Court, which is denied to other citizens, of holding them in bondage or emancipating them as *her* discretion or caprice shall thereafter direct. The record states that thereupon it was ordered by the Court that the petitioner should have the permission prayed. Either this order was null as transcending the power delegated to the Court, or, however indiscreet and inconsistent with sound policy, it availed to bestow on the petitioner the permission asked. No more appears on the record, and if the liberation must be of record, and a liberation means a setting free by the owner, then, unless permission to do a future act, if the applicant should choose to perform it, be *that act,* the plaintiff has not been liberated.

If, however, we can look beyond the record, the plaintiff's claim to freedom is in no respect aided. (389) The bonds which the case states to have been given form no part of the act of liberation. They are required by particular statutes, which impose penalties for an omission to execute them in a prescribed time after liberation. A liberation is complete without them. In the conditions of these bonds the plaintiff is mentioned, not *as freed,* but (cautiously) as a *slave* whom Elizabeth Henry is *permitted* to emancipate. The other facts stated are all in opposition to the plaintiff's claim. They show that his owner never did assent to abandon her dominion over him as owner. And it has been decided by our highest judicial tribunal that even

the Legislature cannot emancipate a slave without the assent of his master. *Allen v. Peden,* 4 N. C., 442.

PER CURIAM. Judgment affirmed.

Cited: Mayho v. Leary, 25 N. C., 227; *Stringer v. Burcham,* 34 N. C., 42; *Allen v. Allen,* 44 N. C., 62.

DEN ex dem. of RICHARD WOOD and WIFE et al. v. WILLIAM A. SPARKS.

Where a testator devised that his "executors" should sell his lands, and appointed three persons executors, only one of whom qualified and acted as executor, a sale by that one alone will, under the statute of 21 Hen. VIII., ch. 4, be sufficient to pass the estate, without its appearing that the others either have *renounced* the executorship or *refused* to join in the sale.

EJECTMENT for a lot in the town of Plymouth, tried at WASHINGTON, on the last circuit, before his Honor, *Judge Settle.* The lessors of the plaintiff claimed title to the lot in dispute as the heirs at law of Levin Bozman, deceased; and the defendant set up title under the will of the said Bozman, and a conveyance from William A. Bozman, in pursuance of a power therein contained. The power was expressed in these words: "If my executors should think it best, I wish them to sell my real estate in the town of Plymouth to the best advantage for the benefit of my children." Of this will the testator appointed three executors, viz., Judith, his widow, the said William A. Bozman and a certain William Currell.

(390) The will was executed 30 November, 1823, and was duly proved at February Term, 1824, at which term the widow entered her dissent to the will, and William A. Bozman alone qualified as executor. The conveyance was made by the said William as executor on 13 March, 1827. It was in evidence that he alone had advertised the lot for sale for six weeks previously to the sale; that the widow had never acted as executrix; that Currell had not seen the will before the trial of this suit, and on the said trial he swore that he had not in any manner acted as executor, and that he

was resolved never to act as such. There was no evidence, however, that the widow or Currell had *renounced* their right to qualify as executors, or that either of them had been called on to join in the sale of the lot, or had refused so to do. Upon this statement of facts his Honor declared his opinion that a sale by the sole acting executor would be effectual to pass the title of the deceased to the premises; and in deference to this opinion the plaintiff submitted to a nonsuit and appealed.

Iredell, for the plaintiff's lessors.
Badger and *Devereux,* for the defendant.

GASTON, J., after stating the case as above, proceeded: Under the will of Levin Bozman no estate passed to his executors. The inheritance descended at his death to his heirs at law, liable to be divested, upon a sale made by his executors. When a sale should be made as directed, the purchaser would take the estate under and by the devisor. The power was given, not to persons by name, but to his executors, but the object of the power was the benefit of the heirs at law, and not the furtherance of any duty properly appertaining to the office of executors. It was a pure, naked power, uncoupled with an interest. Whatever construction of this power might be thought by us best calculated to effect the intention of the testator, the weight of authorities seems to be that antecedently to the Statute of 21 Henry VIII., ch. 4, it would not have been regarded as a power so attached to the office of executor, as that it might be exercised by *one only* of them if he alone accepted the office. Many (391) inconveniences resulted from the narrow construction which the courts thought themselves bound to give to such powers; and the preamble to the Statute of 21 Henry VIII., ch. 4, complains grievously of the evils thereby occasioned. It recites in language of strong reprobation that many persons have by their last wills and testaments willed and declared their lands to be sold by their executors for the payment of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up of their children, and for other charitable deeds; and, notwithstanding such trust and confidence so by them put in their executors, some of them, willing to accomplish that trust,

have accepted and taken upon them the charge of the said testament, and have been ready to fulfill all things therein contained, and the residue of them, uncharitably, contrary to the trust reposed in them, have refused to intermeddle in anywise with the execution of the will or with the sale of such lands so willed to be sold; and it further recites that a bargain and sale of such lands, "after the opinion of divers persons," can in nowise be good and effectual in the law, unless the same be made by the whole number of the executors named to and for the same, by reason whereof the laudable purposes of such testators have been disappointed. After setting forth these mischiefs, for remedy thereof the statute enacts that where part of the executors named in any such testament of any such person so making or declaring any such will of lands to be sold by his executors after his death *"do refuse to take upon him or them the administration and charge of the same testament and last will,"* "then all bargains and sales of such lands so willed to be sold by the executors of any testator, as well heretofore made as hereafter to be made by him or them only that so doth accept, or that heretofore hath accepted and taken upon him or them any such care or charge of administration of any such will, shall be as good and as effectual in the law as if all the residue of the same executors named in the said testament so refusing the administration of the same testament had joined
(392) in the making of the bargain and sale," etc. A proviso is annexed, that the act shall not extend to give power to an executor or executors at any time thereafter to bargain or put to sale any lands, etc., by virtue and authority of any will or testament theretofore made, otherwise than they might do *by the course of the common law* afore the making of the act.

The question as to the valid execution of the power depends upon the proper exposition to be given to this statute. On the part of the lessors of the plaintiff it is insisted that a sale by less than the whole number of the executors is not thereby legalized unless those not joining therein have *renounced* the office of executors before the ordinary. In support of this position authorities have been cited to show that the spiritual court requires such a renunciation by executors before it will grant administration with the will annexed because of their

refusal to take the office; and it is argued that this settled practice shows that nothing less than such a renunciation can be deemed a *refusal,* and that therefore the statute, when it speaks "of a refusal to take the administration and charge of the will," must be understood to speak of a renunciation—of that solemn act which the spiritual court regards as such a refusal. There are many reasons which induce us to believe that this position is not well founded. The ordinary hath no power to grant administration except in cases of intestacy. If a man make a will, but do not name an executor, the will is not a testament, but is confided by the ordinary to the care of an administrator by him appointed to see it faithfully executed. If in the will executors be named, these, by virtue of the will, take the legal interest in the testator's goods and chattels, and until this interest be released, disclaimed or abandoned, there is no intestacy. In the case of a testament such a release, disclaimer or abandonment is indispensable to give the ordinary jurisdiction to appoint an administrator. It is essential, therefore, to the validity of a grant of letters of administration that they show either that the deceased died intestate or that he has become intestate by reason of the death or refusal of the trust by those whom the deceased named to execute his will. The ordinary hath (393) very properly established certain rules of evidence by which the fact of such refusal may be made out to his entire satisfaction. The renunciation of the office before him is one mode by which it can be clearly testified. It may also be done by a writing addressed to the ordinary and filed or recorded in his court.

And so it may be by failing to appear to a citation calling on the executor or executors nominated to come forward and accept the executorship. However made to appear, he adjudges that the executor or executors have refused to prove the testament. Had the statute contemplated such a renunciation as indispensable, it can scarcely be believed that it would not have used the appropriate terms, "refused the probate of the will before the ordinary." But it alludes not in the slightest degree to the usages or adjudications of the spiritual court. It legislates upon a subject—the devise of lands—over which that court had no jurisdiction. It purposes to correct what it deems a mischievous doctrine of the

courts of *common law* in relation to a matter whereof these courts can take cognizance, and undertakes to make a new law, which is to be there observed. These courts, in inquiring whether a power given by a devisor had or had not been validly executed so as to pass his real estate were not under a necessity to notice what had been done respecting the will in the spiritual court. Its probate *there* in no respect affected it as a will of lands. The qualification of the executors *there* was wholly unnecessary to the execution of the powers which the will gave them over lands; and their renunciation of *the office* in no respect took away any of those powers, unless from the words of the will it appeared that the powers were given to them *simply as executors*. The courts of law, after, as before the statute, had to determine on these powers and their valid execution by rules distinct from and unconnected with the rules of the spiritual courts. By the common law the execution of the power was invalid if all the donees of the power did not join therein. The statute introduced a modification which rendered it unnecessary for those to join who refused to take upon themselves the administra-
(394) tion and charge of the will. When the fact of such a refusal was averred, the truth of the averment was to be ascertained by the proper triers and through the medium of any evidence which by the rules of the common law was competent to establish the fact. The inquiry was of a matter *in pais*. Whatever respect the courts of law might yield to the acts of the ordinary within the sphere of his jurisdiction, they would never surrender to him the determination of a fact which affected the rights of parties litigant before them, and on a subject of which they had exclusive jurisdiction. The probate of the will might be received as evidence that those who so proved it had accepted the care and charge of the administration of the will of the deceased, and a renunciation before the ordinary would be evidence that they had declined the charge of administering the personal estate of their testator. But, notwithstanding the probate, it might yet be that they had refused to join in the sale of the lands; and notwithstanding the renunciation, it might be that they had intermeddled with the execution of the will. The construction contended for would not be in accordance with that liberal spirit which should govern in the interpretation of

statutes of a benignant character. The great purpose of the statute is to correct mischiefs resulting from a rigid construction of these testamentary authorities, and it is the rule of law so to expound the act as to suppress these mischiefs and apply its remedies. If it were in the power of one or more of the executors, by forbearing to renounce before the ordinary, still to hang back, decline acting and practically refuse the execution of the trust, and those willing to perform it were yet powerless, notwithstanding the statute, but little would have been accomplished for insuring the execution of the testator's purposes. No adjudication has been cited in support of this position, nor is it upheld by the authority of any respectable elementary writer. In the case of *Bonafault v. Greenfield,* 1 Lev., 60; Cro. Eliz., 80, one of the executors had refused to take out administration or to intermeddle with the estate, or to join in the sale, but had not renounced before the ordinary or disclaimed by deed. The Court thought that a sale by the other executors was good, (395) at common law, because it satisfied the words of the will; but they held that, however that might be, *the statute made it clear.* This case is quoted as of undoubted authority by *Mr. Justice Holroyd,* in *Townson v. Tickell,* 3 Bar. & Ald., 31; 5 E. C. L., 219, and reasoning by analogy, he *infers* from it, that where an estate is devised to two beneficially, and by name, one may refuse the estate by matter *in pais* without a disclaimer, either by deed, or of record. The text-writers lay down the rule in *broad* terms, that where some refuse to act, the executors accepting the trust may sell. Co. Lit., 113 a; 6 Cruise Dig., 456; 4 Kent Com., 320; Perkins, p. 238, sec. 545, is still more pointed. "If a man maketh his will, and maketh two executors, and willeth that his executors shall sell his land, etc., and dieth, and one of them *will not intermeddle,* and the other taketh administration upon him, and payeth the debts, etc., the sale made by him alone, is good." In Virginia (see *Eddy v. Butler,* 3 Mum., 345, and *Nelson v. Carrington,* 4 Mum., 332) it has been decided, that a conveyance by part of the executors named in the will, is justified by the Statute of 21 Henry VIII., where the others refused to take upon themselves the charge or administration thereof, and that such refusal may be found, either from declarations *in pais,*

or may be presumed, as in other cases. But whatever may be the law elsewhere, with us it is settled. Here, the question cannot be considered as an open question. In *Marr v. Peay,* 6 N. C., 84, the Supreme Court of this State, under its former organization, declared the law to be, that a renunciation in the Court of Probate furnished evidence of the refusal mentioned in the statute; but was not indispensable evidence. In the subsequent case of *Debow v. Hodge,* 4 N. C., 36, the same doctrine is very plainly recognized. This exposition had been long before given by a learned Judge on the Circuit, as will be seen in *Miller v. White,* 1 N. C., 223. It is here, then, a fixed rule of property, that where a power is given to executors to sell lands, it is sufficient that the acting executor or executors living at the time, make the sale.

(396) It is further objected, by the lessors of the plaintiff, that if a formal renunciation before the court of probate be not necessary, yet, that in this case there was not evidence of such a refusal by the other executors, as justified the sale made by him who alone proved the will. It is admitted, that Judith Bozman's refusal of the office sufficiently appears. It is alleged, however, that Currell had only forborne to execute the office, and omitted to join in the sale, but had not *refused* the one or the other. This objection also appears to us not tenable. When a man confides to another the management of his estate after his decease, the nature of the office calls for prompt action. The duties arise immediately upon the death of the testator; and a forbearance to enter upon the execution of them when the will is proved, is presumptive evidence of a refusal to accept the charge of his testament. A renunciation of record is clearly evidence of such refusal; yet if Currell had in this case actually so renounced, it is not to be questioned, but he *might* have come forward the next day and taken the oath of office and entered upon the execution of its functions. Such a renunciation then would have amounted to no more than a declining at that time to act as executor. So long, therefore, as he declines, he refuses. Now our laws prescribe the only *regular* way in which the acceptance of the office can be testified. No person, says the Act of 1715 (Rev., ch. 10, sec. 4), shall presume, under a penalty therein

expressed, to enter upon the administration of a deceased person's estate, without letters testamentary; and the secretary shall not issue such letters until the executor shall have sworn to execute the will of the deceased. His interference, without taking out letters or swearing to execute the will, would unquestionably subject him to the responsibilities of an executor, and might, perhaps, notwithstanding the impropriety of such conduct, constitute him a full executor. But, at all events, such an interference is not to be presumed. The forbearing to qualify is therefore *prima facie* evidence of refusal. But if he neither qualify nor act—if he intermeddle not with the estate of the deceased either regularly or irregularly—then the evidence of refusal is full. The care and administration of the testament have been tendered to him by the testator and he has declined the acceptance of the trust.

If the office has been refused by him it is not nec- (397) essary that it should *appear* that he has *also* refused to join in the sale. This case was expressly settled in the case of *Marr v. Peay,* before referred to.

The Court is of opinion that there is no error in the judgment below, and that it should be affirmed with costs.

PER CURIAM. Judgment affirmed.

Cited: Davis v. Inscoe, 84 N. C., 401; *Gay v. Grant,* 101 N. C., 219; *Jordan v. Spiers,* 113 N. C., 346.

THOMAS T. ARMSTRONG, chairman, etc., upon the relation of JOHN M. CLOUD v. JOSEPH MARTIN et al.

A court of law will not entertain a suit against an executor or administrator with the will annexed, for the non-performance or improper execution of a discretionary power given in the will. *Therefore*, where a testator directed that his grandson should be "raised" and "taken care of," and "educated" "at the direction and care of" his son James, it was *held*, that an action could not be maintained on the bond of the administrators with the will annexed, for the expenses of such education, though the son James was also one of the administrators.

DEBT, brought against the defendants upon an administration bond, which had been executed by one James Martin and Joseph Martin, as administrators, with the will annexed, of John Martin, deceased. The breaches assigned were, that the administrators had failed to perform the duties and comply with the directions contained in the following clause of the will, viz.: "And now let this be taken as my special will and desire, that my three grandchildren, John Martin Cloud, Mary Ann Cloud, and Jeroam Eliza Cloud, be raised and taken care of at the direction and care of my son, James Martin; and that the two girls be educated so as to read and write, and Martin as hereafter mentioned in this will. I also will that John Martin Cloud have, at the age of twenty-one years, which I now will and bequeath to him, a small negro boy by the name of Saunders; also one horse and saddle, worth seventy-five dollars; and be educated so as to understand and know the English, Latin and Greek languages; and after this far learned, to be got to the study of the law, if capacity will allow of it."

1. Because the administrators had failed to supply the relator, John Martin Cloud, with funds necessary to
(398) educate him "so as to understand and know the English, Latin and Greek languages," and also to furnish him with the necessary funds for clothing and boarding during the period for acquiring his education.

2. Because the administrators had failed to supply the relator with the necessary funds for instructing him in the study of the law, and to furnish him with the necessary boarding and clothing.

Plea—Conditions performed and not broken.

Upon the trial of the issue at STOKES, on the last Spring Circuit, before his Honor, *Judge Martin,* evidence was introduced, the result of which tended to establish the breaches contended for by the relator. It was then insisted on the part of the defendants: 1. That James Martin was appointed a testamentary guardian or trustee for the special purpose of raising, taking care of, and educating the relator. That it was a personal trust confided by the testator to James, and to be exercised by him at his discretion, which could not be controlled by a court of law; and that James, the trustee, being also one of the administrators, and having funds in his hands, the defendants are not liable for the misapplication of them. That when the trust was once assumed, it could not be resigned by James, and that the other administrator had no right or authority to interfere in controlling the education.

2. That by the will the testator's estate was not liable to furnish the funds for boarding and clothing, during the period of schooling, and that the estate was not bound to defray the expenses incurred in acquiring instruction in the law, nor for boarding or clothing during that period.

These objections were overruled by his Honor, who instructed the jury that the trust reposed in James Martin was not such a personal trust as discharged the administrators from complying with the requirements of the will; and that it was a trust which, though once assumed, might at will be resigned. That from the construction of the will the testator intended that the relator should be furnished with boarding, clothing and schooling, at the expense of his estate; and that instruction in the law, together with (399) board and clothing, was likewise intended to be a charge. A verdict was returned for the plaintiff, and the defendants appealed.

Nash, for the defendants.
Badger, for the plaintiff.

RUFFIN, C. J. Upon the construction of the will, the Court does not doubt that under the terms, "raised and taken care of," and "educated," which are all used by the testator, the board, clothing, and tuition of the three grandchildren,

are all to be provided for, while at school during their minority. It is not deemed so clear that a similar bounty is intended for the relator, during the period he might be engaged, after full age, in the study of the law. Other provision is made for him at twenty-one, and the words "that he be *got* to the study of the law," may be rather the expression of the testator's wish as to his grandson's profession, and a request to him to adopt it, than the extension of a further bounty to him in providing for his support during the term of study. But upon the extent of the benefit intended for the relator, the Court does not deem it necessary to pronounce a decided opinion, since, whatever it may be, it does not appear to be the subject of adjudication by a legal tribunal.

If it be yielded, that a legatee generally can sue on the bond of an administrator with the will annexed, for a legacy to which the administrator has assented, or to which he improperly refuses his assent—propositions, on which no opinion is given—yet the relator in this case has, from the nature of the dispositions in his favor, a difficulty which seems to the Court to be insuperable.

The testator does not bequeath to him a specific thing, nor even a pecuniary legacy *in numero;* but provides for his maintenance and education. The purposes of such a charge naturally imply a discretion, devolving on some person. The schools at which a youth should be placed, the families in which he should reside, and the quality of his apparel, are subjects for selection; and the propriety of each much (400) depends upon the station of the testator's family in society, the extent of the estate, and the grandson's expectations, capacity, and docility. If the testator had not conferred the discretion alluded to on any particular person, it is not easy to see how, in a court of law, the executors or administrators with the will annexed could be made answerable for culpable negligence in the exercise of it. But in this will the discretion is expressly delegated to the testator's son, whom he names. His Honor held that this was not a confidence personal to James, but that the representatives are bound to see it faithfully executed, either by him or themselves, and for default are responsible at law. That the estate is chargeable with the money needful to the ends directed, is beyond a doubt; and if the fund has not been pro-

vided, that a court of equity would yet order it to be raised, is readily admitted. But if the estate has once contributed the fund, and it has been placed in the hands which are to disburse it for the purposes prescribed by the testator, and it has been wasted, there seems to be no ground for doubly charging the estate to raise it again; and yet less for making the co-administrator responsible for the unfaithful trustee (who happened also to be an administrator) in a trust to which he was specially appointed by the testator himself. But whatever may be the facts on this part of the case, whether any fund was provided and set apart for this particular purpose, in the hands of James; whether it was adequate or inadequate, or applied or not, could be properly inquired into in this action, because, in our opinion, the discretion was entirely in James, and the relator is conclusively bound at law by his determination.

Courts of equity relieve against conditions, and prevent advantage being unconscientiously taken of their breach or non-performance; and also control the unreasonable exercise by one of a power or discretion which may affect the interests of another person. The propriety of assuming to review and reverse the determination of one to whom a testator has given a discretion, absolute in terms, upon the ground that it was not a reasonable and just determination, though arrived at after fair inquiry and full deliberation, has not escaped animadversion, since it makes the (401) instrument read so as to confer on the chancellor the discretion which the maker of it declares he reposes exclusively in the individual selected by himself. But the jurisdiction is established; and upon the facts now appearing, relief would certainly be granted in equity, there being no cause whatever assigned for the neglect to provide for the relator; and such neglect or refusal without cause is, by itself, unreasonable; and it does not appear that any fund was in fact provided. But a court of law is bound by the terms of the will; and the acts, right or wrong, of him to whom the testator gives the authority to decide must stand as parts of the will. It is the testator's bounty, and must be taken, subject to the restrictions by him imposed. If he puts it upon the will and judgment of another person, that will, however vicious, and that judgment, however erroneous and unrea-

sonable, cannot be controverted at law. If the law itself confers an authority or discretion, it means a reasonable and not an arbitrary one, and guards its faithful exercise by giving damages for its malicious abuse; but a court and jury cannot limit a discretion, which parties for themselves declare shall be unlimited, or to which they have affixed no limit. Damages cannot be given for the neglect to exercise it, for there is no legal obligation to do so. Nor can its exercise upon mistaken, unreasonable or dishonest motives, be set at naught as not being, for those reasons, obligatory; because the motives do not impeach the legal power, but only affect the conscience of the party. The Court is unable to find a case of such a jurisdiction at law, and knows of no principle on which to base it. For this reason the judgment of the Superior Court is reversed and a new trial to be had.

PER CURIAM. Judgment reversed.

Cited: Cloud v. Martin, 22 N. C., 276; *Lindsay v. Hogg,* 41 N. C., 5; *Hinton v. Hinton,* 68 N. C., 104.

(402)

JOHN D. CLANCY v. BENJAMIN OVERMAN.

1. Where a party incurs an obligation by his own act, he will be bound to the extent of his engagement, and will not be excused for its non-performance by accident from inevitable necessity, as he would be if the obligation were imposed upon him by law. And for the breach of such voluntary engagement the extent of the injury forms the proper measure of damages, however the performance may have been defeated.

2. If the owner of a slave binds him as apprentice, and covenants that he shall faithfully serve his master, etc., and the master covenants to teach the apprentice a trade, these covenants are mutual and independent, and a breach on one side is no bar to an action for a breach on the other.

3. A covenant to teach an apprentice, or cause him to be taught, a trade, is not an absolute engagement that he shall at all events learn that trade, but is only a covenant for faithful, diligent and skilful instruction.

4. The acts and declarations of a slave-apprentice is evidence on the part of the master in an action by the owner, to show the temper and disposition of the apprentice.

COVENANT, brought upon the following instrument: "This indenture, made this 22 January, 1827, between John D. Clancy, of, etc., of the one part, and Benjamin Overman, of, etc., of the other part: Witnesseth, that the said John D. Clancy doth bind unto the said Benjamin Overman a negro boy, named Essex, for the term of three years, commencing from the date above written, during all which time the said negro boy his master shall faithfully serve, his lawful commands everywhere readily obey; he shall not absent himself at any time from his said master's service, but in all things as a good and faithful servant shall behave towards his said master: And the said John D. Clancy doth further agree to furnish the said negro boy with materials for clothing: And the said Benjamin Overman doth covenant, promise and agree, to and with the said John D. Clancy, that he will teach and instruct, or cause to be taught and instructed, the said negro boy, the art and mystery of the coach-making business; that he will sustain the expense of making his clothes, and that he will provide the said negro boy with sufficient diet and lodging. In witness whereof, etc.

JOHN D. CLANCY, [L. S.]
BENJ. OVERMAN. [L. S.]"

"Test: JNO. CONRAD."

(403) The breach assigned in the plaintiff's declaration was, that the defendant had not taught and instructed, nor caused to be taught and instructed, the slave Essex, mentioned in the covenant, the art and mystery of the coach-making business.

Pleas—Covenants performed and not broken; previous covenants not performed.

Upon the trial at GUILFORD, on the last circuit, before his Honor, *Judge Norwood*, the plaintiff offered evidence to show that the slave Essex did not understand the coach-making business at the expiration of his term of service with the defendant. The defendant, on his part, offered evidence to show that he made all proper exertions to teach the slave Essex, but that said slave had not capacity enough to learn the coach-making business. He proved further, that the said Essex, during his apprenticeship, frequently, in the absence, and without the knowledge of the defendant, would go to a neighboring store and procure spirits, by which he would sometimes become moderately intoxicated. The defendant offered to prove further, that when he would instruct Essex about his work, and threaten to punish him if he did not exert himself to learn, as soon as he, the defendant, was absent, Essex would declare that he did not care about learning the trade; it was no profit to him; and if he could avoid the lash, it was all he cared for. This evidence of the declarations of Essex was rejected by his Honor. Upon the evidence given, the defendant's counsel insisted that, if the defendant had made every proper exertion, and the slave Essex had not capacity to learn the coach-making business, the plaintiff could not recover. He insisted, also, that the covenants of the plaintiff were precedent and dependent, and that a breach of them on the part of the plaintiff was a valid defense for the defendant. His Honor instructed the jury that the covenants of the plaintiff were not precedent and dependent, but that the covenants on both sides were mutual and independent, and that if there had been a breach thereof by the plaintiff, it was no defense to the defendant. He also charged the jury that the covenant of the defendant was absolute, and that he could not be excused from its performance

(404) for want of capacity in the boy Essex to learn the coach-making business; but that the jury might take

that into consideration in estimating the damages, if they should find for the plaintiff. Under this charge a verdict was returned for the plaintiff, and the defendant appealed.

No counsel appeared for the defendant.

W. A. Graham, for the plaintiff, contended:

1. That the defendant had entered into an absolute covenant that the apprentice should be taught and instructed the art and mystery of the coach-making business, and that this covenant had not been performed, unless the apprentice had become a good workman. The stipulation contains no exceptions, nor does it simply oblige the master to *endeavor to teach,* or to instruct *in* the art of coach-making; but positively undertakes that he shall be taught the trade. This not having been done, the master is not excused by want of capacity in the apprentice, or any other of the circumstances exhibited by the evidence, though they were properly considered in estimating damages. Where the law imposes a duty which it becomes impossible to perform, the non-performance is excused; but where a party covenants to do a particular thing, and receives a recompense therefor, he is responsible in damages for a failure, although it be impossible. *Parodine v. June,* Aleyn, 26; *Monk v. Cooper,* 2 Ld. Ray., 1477; *Appleton v. Bink,* 5 East., 148; *Shubrick v. Salmon,* 3 Burr., 1637; 1 Sel. N. P.

2. The jury were properly instructed that the covenants in apprentice bonds are mutual and independent. *Winston v. Linn,* 4 E. C. L., 131. This is the more particularly true where the apprentice is a slave, and the authority to enforce obedience is almost unlimited.

3. The idle declarations of the slave, made to the other apprentices when the master was absent, and which do not appear ever to have come to his knowledge during the apprenticeship, were properly rejected as *res inter alias acta.* In *Winston v. Linn* the declarations of the apprentice were admitted, but only those made in the presence (405) of the master.

GASTON, J. There is a well-known distinction between obligations imposed by the law and those created by express contract. When the law imposes a duty, and the party

charged is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party, by his own contract, imposes unconditionally a duty or charge upon himself, he is bound to perform it, or answer in damages for its non-performance, notwithstanding any accident by inevitable necessity. In the latter case the contract constitutes the law between the parties, and if it contain no exception, none will be presumed. This Court agrees, therefore, with the Judge below, in holding that the engagement of the defendant was absolutely binding to the extent of that engagement; and it is also of opinion with him that the covenants of the respective parties to this indenture were mutual and independent. But we do not concur in the construction which was given below to the covenant of the defendant. It seems to us that an engagement to teach the apprentice, or to cause the apprentice to be taught, a trade, is not an engagement that the apprentice will learn that trade. If it were so, then had the apprentice died on the day succeeding the execution of the indenture, or had been visited by an infirmity which utterly disabled him to learn, or had obstinately resisted every proper effort to make him learn, the covenant would have been broken, and the defendant responsible in damages for the breach. Nor do we think that, in such a case, these circumstances should avail to lessen the damages; for, if an individual deliberately bind himself to *insure* a certain result, and the obligation is broken, the extent of the injury forms the measure of damages, however the performance may have been defeated. It would be doing violence, we think, to the words found in this covenant to regard them as stipulating for more than faithful, diligent and skilful instruction. The case of *Winston v. Linn,*

4 E. C. L., 131, which has been cited for the plain-
(406) tiff, does not conflict with this opinion. It was there held that the covenants were mutual and independent, and that disobedience on the part of the apprentice, and his temporary withdrawal from the service of the master, did not warrant the latter in insisting that the *indenture was dissolved.* It decides no more; and the learned *Mr. Justice Bayley,* who presided on that occasion, and whose views are given more *in extenso* than those of his brethren, expressly says: "If he (the apprentice) had continued to absent him-

self to the end of the term, there can be no doubt but *that* would have been an answer to the action."

This Court is also of opinion that the evidence offered of the acts and declarations of the apprentice was improperly rejected. They may not have been of great importance, and they are not evidence because of any credit due to the party by whom they were done or uttered; but his *acts* are evidence because they are *his* acts, and his declarations are evidence because his disposition and temper are subjects of investigation; and these cannot be ascertained but through the medium of such external signs.

The judgment below is to be reversed, and a new trial awarded.

PER CURIAM. Judgment reversed.

Cited: Wyatt v. Morris, 19 N. C., 110; *Roulhac v. White,* 31 N. C., 65; *Bell v. Walker,* 50 N. C., 45; *Poyner v. McRae, Id.,* 278.

THE STATE, upon the relation of JESSE DICKENS, v. THE JUSTICES OF PERSON COUNTY.

1. Where a clerk, elected prior to the Act of 1832, ch. 2, during good behavior, was in court, when a person elected under that act was admitted as clerk, and made no objections to the Court against such admission, but surrendered the books and papers to the new clerk, and likewise neglected to tender his bonds, which he was bound by law to renew at that term, it was *held*, that such conduct amounted to an abandonment of the office, and justified the admission of the new clerk.

2. Where the proceedings under a writ of *mandamus* are dismissed, the relator may be ordered to pay the costs.

A WRIT of MANDAMUS was obtained at the instance of Jesse Dickens, directed to the Justices of the County Court of Person, commanding them to restore said Dickens to the office of clerk of their court, from which he (407) alleged he had been illegally ejected, or to signify their reasons for failing to do so. To this writ the justices made a return signed by their chairman, in which they say "that they decline to restore the said Dickens to office, for two reasons:

1, because Charles Mason was duly elected to the said office by the people, under the Act of 1832, ch. 2, and regularly admitted into the office, at September Term of said court, 1833; and, 2, because the said Dickens failed at the said term to renew his official bonds, as by law he was bound to do, for he had not renewed them since September Term, 1832; and also, that the said Dickens did not object to the admission of the said Mason into office, but voluntarily surrendered to him the records of the office." From the petition upon which the writ was obtained, and from the facts agreed, it appeared that Dickens was duly elected clerk during good behavior, in the year 1793; that from that period to September Term, 1833, he had continued in the said office, acting as clerk, and had regularly renewed his bonds as required by law; that at September Term, 1833, when his bonds were again to be renewed, he carried clerk's official bonds written out, but not signed, into court, but did not tender them to the Court; that one of the first acts of the Court at that term was to receive Mason as clerk; whereupon Dickens, who was then sitting at the clerk's desk, said to his deputy, but not so as to be heard by the Court: "They have taken the office from us; we must give it up," and retired. It appeared, further, that Dickens was not a candidate for election before the people, and that at a term subsequent to that of September, 1833, he tendered his bonds to the Court, when they were refused.

This case coming on to be heard at PERSON, on the last Spring Circuit, before his Honor, *Judge Martin,* upon the petition, writ, return, and the facts agreed, the proceedings were dismissed at the costs of the relator, and he appealed.

J. W. Norwood and *P. H. Mangum,* for the plaintiff.
W. A. Graham, contra.

(408) DANIEL, J., after stating the case, proceeded: This case was within the reasons of the decision in *Williams v. Somers, ante,* 61. Dickens was present, and made no objections to the Court, at the time Mason was sworn in, but surrendered the books and papers to him. He neither claimed the office nor tendered bonds, as by law he was bound to do, at that term. The abandonment of the office was con-

clusively to be inferred from these facts. The observations to the deputy were not communicated to the Court, and could not be acted on by the Court, and consequently cannot affect the decision of this Court. The judgment must be affirmed.

In England the king is considered the prosecutor in writs of *mandamus;* and at common law, neither received or paid costs. Though upon discharging a rule *nisi,* the costs of the motion was in the discretion of the Court. 1 Chit. Prac., 809. In this case the costs must be paid by the relator Dickens, it being in the nature of a rule *nisi.*

PER CURIAM. Judgment affirmed.

Cited: S. v. Jones, 23 N. C., 134; *Patterson v. Murray,* 53 N. C., 280.

THE STATE v. SAMUEL FITZGERALD.

Where an indictment charged, in effect, that the defendant, a constable, falsely affirmed that a note for the payment of money was a forthcoming bond, and that by means of such falsehood the defendant deceitfully prevailed on the prosecutor to execute a promissory note for the payment of a sum of money: it was *held,* that the charge was too vague and uncertain, in not stating how the result was produced by the falsehood practiced.

THE defendant was convicted at MACON, on the last circuit, before his Honor, *Judge Martin,* upon the following indictment, to-wit:

"The jurors for the State, upon their oaths present, that Samuel Fitzgerald, late of, etc., on the first day of April, in the year of, etc., then and there being constable of the county aforesaid, by virtue of which office of constable he, the said Samuel Fitzgerald, had levied various executions on the property of one Purnel Wrathbone, in the county aforesaid, did then and there unlawfully pretend to (409) the said Purnel Wrathbone, and one William Wrathbone, that a certain paper-writing then and there presented by him, the said Samuel Fitzgerald, to the said Purnel Wrathbone, and William Wrathbone, was a bond for the delivery of property of him, the said Purnel

Wrathbone, theretofore levied on by him the said Samuel Fitzgerald, constable as aforesaid, by virtue of the executions aforesaid, on a certain day then and there mentioned by him, the said Samuel Fitzgerald; when in truth and in fact, the said paper-writing then and there presented by him, the said Samuel Fitzgerald, to them, the said Purnel Wrathbone and William Wrathbone, was not a bond for the delivery of the property aforesaid, but a promissory note, for the sum of twenty-six dollars and thirty-seven and a half cents; by means of which said false affirmation, the said Samuel Fitzgerald did then and there unlawfully procure to be signed and sealed by the said Purnel Wrathbone and William Wrathbone, a promissory note under seal, to him, the said Samuel Fitzgerald, for the sum of twenty-six dollars and thirty-seven and a half cents; and did then and there procure the same to be delivered to him, the said Samuel Fitzgerald, by the said Purnel Wrathbone and William Wrathbone, to the great hindrance of public justice, to the evil example of all others in the like case offending, and against the peace and dignity of the State."

A motion in arrest of the judgment having been submitted and overruled, the defendant appealed.

No counsel appeared for the defendant.

The *Attorney-General,* for the State.

GASTON, J. The indictment in this case charges, that the defendant, having, as a constable, levied certain executions on the property of the prosecutor, did falsely pretend that a certain paper-writing by him presented to the prosecutor and William Wrathbone, was a bond for the delivery of property of the prosecutor theretofore levied on; when in truth and in fact the same was not a bond for the delivery of the said property, but a promissory note for the sum of twenty-
(410) six dollars and thirty-seven and a half cents; by means of which false affirmation, the defendant did unlawfully procure to be signed and sealed by the prosecutor and the said William, and to be delivered to him, the defendant, a promissory note under seal for the sum of twenty-six dollars and thirty-seven and a half cents, with intent to defraud the prosecutor and the said William. It has been con-

tended, on the part of the State, that this indictment sufficiently charges the defendant with having procured from illiterate persons, the prosecutor and the said William, the execution of a deed to their prejudice, by reading the instrument to them in different words from those in which it was written, or by a false representation of its contents. It is not impossible, that such are the facts of the case, and if they be, and this indictment does not so set them forth, an arrest of the judgment in this case will not be a bar to a prosecution in which the charge may correspond with the facts. In considering, however, whether in law, the conviction warrants the judgment which was rendered below, we are confined strictly to the record, and upon it, we can neither see the offense charged as has been supposed, nor indeed any offense charged with that certainty which is required in criminal prosecutions. We must understand legal terms in the indictment in their legal sense, unless by other sufficient and plain words, another meaning is impressed upon them. The instrument "presented" is not stated to have been prepared as and for a promissory note, to be executed by those to whom it was presented, but is alleged to be in fact and in truth, a promissory note. Now a promissory note is a written engagement promising the payment of money, and signed by the party promising. The instrument "presented," is not stated to have been represented as one prepared for execution as a forthcoming bond, but to have been represented as a forthcoming bond for the property levied on. To represent it as a bond is to represent it as a writing obligatory sealed and delivered by the obligors. There is no expression or phrase in the indictment from which we can perceive that these words "note" and "bond," are used in any other than their legal sense. It is not averred that the defendant (411) "procured" to be signed and sealed, the paper-writing presented, but that he procured *a note* to be executed for the payment of the sum of twenty-six dollars and thirty-seven and a half cents. Nor is it averred that the parties who were so prevailed on to execute this note were illiterate persons, or executed a different instrument from that which they understood it to be. Then, in legal construction, the indictment must be regarded as charging that the defendant falsely affirmed, that a note for the payment of money was a forth-

coming bond; and that by means of such falsehood, the defendant deceitfully prevailed on the prosecutor and the said William to execute a promissory note, or (as it should have been termed) a bond, for the payment of a sum of money. It is not necessary to inquire whether by means of such a false affirmation, a cheat or fraud might not be practiced under circumstances which would subject the offender to a criminal prosecution, but it seems to us essential in a case where there is no obvious connection between the result produced and the falsehood practiced, that the facts should be set forth which do connect the consequence with the deceitful practice. It is a general rule in indictments, that "the special manner of the whole fact ought to be set forth with such certainty that it may judicially appear to the Court, that the indictors have not gone upon insufficient premises." Hawkins, b. 2, ch. 55, sec. 57. Now it is impossible for us to see, upon such a vague and defective statement, how a false representation by the defendant of the nature of an instrument which he had and exhibited, or presented, could have induced any person to give the defendant a bond for the payment of money. It does not judicially appear to us that the indictors have *not* gone on insufficient premises. We are obliged, therefore, to declare the judgment, which has been rendered below, erroneous, and to reverse it.

PER CURIAM. Judgment reversed.

Cited: S. v. Gallimon, 24 N. C., 377; *S. v. York,* 70 N. C., 67; *S. v. Farmer,* 104 N. C., 890.

(412)

THE JUSTICES, etc., to the use of LUCY SHEW, v. DAVID C. STEWART et al.

1. The Act of 1799 (Rev., ch. 531, sec. 3), which authorizes a summary remedy against the reputed father of a bastard child, is not a repeal of the common-law right of suing all or either of the obligors on the bastardy bond; and in suits on such bond the notice required by that act need not be shown.

2. The summary remedy prescribed by this act is only cumulative, and applies only as against the reputed father, and not as against his securities on the bastardy bond.

DEBT, brought on a bastardy bond, the condition of which was as follows: "The condition of the above obligation is such, that, whereas, a certain Samuel Stewart is charged with having a certain illegitimate child begotten on the body of Lucy Shew; now if the same Samuel Stewart, his heirs, executors, etc., shall provide for the support and maintenance of the said child to the indemnification of the parish of the county aforesaid, and shall perform such orders as the Court shall from time to time make in the premises, then this obligation to be void, otherwise to remain in full force and virtue." The breaches of the condition assigned were, that the said Samuel Stewart did not provide for the support and maintenance of the said child to the indemnification of the said county; and that he did not perform such orders of the Court as were made in the premises. The defendants pleaded the general issue, conditions performed and conditions not broken. The writ was issued 24 August, 1832. The plaintiff in support of his case offered in evidence the record of the County Court which contained the following entry and orders: "August Term, 1831, *State v. Samuel Stewart.* Bastardy. Lucy Shew, Pros. The defendant, Samuel Stewart, came into open court and entered into bond in the sum of five hundred dollars with David C. Stewart and Robert Stewart, securities. Ordered by the Court that Samuel Stewart pay to Lucy Shew, the pros., the sum of four dollars instanter; sixteen dollars at August Term, 1832," etc. No further evidence of the breaches were offered. No evidence (413)
was offered that any express notice, or any other notice, except what might be inferred from the record of the County Court, was ever given to the defendants or

either of them, of the orders of the Court, before the filing of the plaintiff's declaration in this case.

Upon these facts appearing to his Honor, *Judge Martin,* on the last Spring Circuit, at GUILFORD, he directed the plaintiff to be non-suited, on the ground that no notice had been served on Samuel Stewart, according to the Act of 1799 (Rev., ch. 531, sec. 3). A motion was made to set aside the nonsuit, which being refused, the plaintiff appealed.

Nash, for the plaintiff.
W. A. Graham, for the defendants.

DANIEL, J., after stating the case, proceeded: It is conceded, that were it not for the act passed in the year 1799 (Rev., ch. 531, sec. 3) the plaintiff might have sustained this action without giving any notice of making any demand for the money due on the orders made by the Court, and have recovered for the breach of the condition of the bond the amount due on such orders at the date of the writ. But it is contended that a different remedy is provided by that act, and that it must be pursued before any action can be had on the bond for the non-payment of the money orders made by the Court. It seems not so to us. The third section of the Act of 1799 declares that when the Court shall charge the reputed father of a bastard child with the maintenance as prescribed by the Act of 1741 (Rev., ch. 30, sec. 10), and the reputed father shall refuse or neglect to pay the same, then the County Court shall have power (on notice being served ten days before the sitting of the Court, or returned by the sheriff that the defendant is not to be found) to order an execution against the goods and chattels, lands and tenements of the said reputed father sufficient to satisfy and discharge such sum as the County Court shall adjudge for the maintenance of the bastard child. This summary way of proceeding against the reputed father (for it does not extend
(414) to the securities) is but a cumulative remedy, and by no means a repeal of the common-law right to sue all or either of the defendants on the bond when a breach of any of the conditions may happen. If the reputed father has property in the county sufficient to satisfy the money orders

made by the Court, the summary remedy is to be recommended, but we cannot say that it is the only remedy. The nonsuit must be set aside and a new trial granted.

PER CURIAM. Judgment reversed.

SAMUEL KELLO et uxor v. NICHOLAS MAGET, administrator of JOHN MAGET.

1. The summary proceedings authorized by the Act of 1830, ch. 68, for the relief of persons likely to be injured by the burning of the records of Hertford County, partake of the nature of proceedings in equity; and the rules of equity practice should, therefore, when applicable, govern them.

2. In proceedings under this act, to recover upon a guardian bond, it is sufficient to show that a guardian bond was given, with a penalty large enough to cover the amount claimed, and that it was executed by the defendant, without showing the names of the justices to whom it was made payable, or the exact amount of the penalty of the bond.

3. Guardian bonds being taken by public authority, have a high character of authenticity, and need not be verified by the ordinary tests of truth applied to merely private instruments, namely, the obligation of on oath and the cross-examination of witnesses; therefore, when the execution of such bonds, taken from their proper repository, is denied by plea, it is only necessary to prove the identity of the defendant in order to sustain the affirmative of the issue.

4. When a witness is called upon to prove facts originally entrusted to memory, he may use a written memorandum which he has formerly made in order to refresh his memory; but if after such help he cannot recollect a particular fact, the writing is not admissible to supply it. This rule, however, does not apply to proof of written instruments or documents; for where such are lost or destroyed, so that they cannot be produced, a copy of them verified in court by the copyist to have been taken from the original, is admissible even in preference to a professed full recollection of their contents by the witness, because such a copy is less liable to error than the memory of the witness. And so, for the same reason, an *abstract* of the original, taken and verified in the same way, is admissible, independent of the recollection of the witness, and even in preference to it, as to the facts which it contains.

PETITION, filed under the Act of 1830, ch. 68, entitled "An act for the relief of such persons as may suffer from the destruction of the records of Hertford (415) County, occasioned by the burning of the court-house

and clerks' offices of said county." By that act it is declared that the court-house and clerks' offices of the county of Hertford have been burned, whereby the records and public and private muniments of title therein deposited have been entirely destroyed; and for the remedy of the mischiefs which such a calamity must necessarily occasion, it is, among other things, enacted that it shall be lawful for any person wishing to sue on any bond thus destroyed to obtain justice by a summary process, filing his petition, wherein shall be set forth the *nature* of the bond, the party or parties thereto, and the injury sustained by the petitioner from breach of its condition, and requiring from the person or persons complained of to answer the allegations of the petition on oath. The act gives authority to the Court to take parol evidence to establish any fact and to decree on the hearing such remedy as the nature of the case may require or the ends of justice demand. This petition was filed in 1831, and the plaintiffs, Samuel Kello and his wife Mary therein charged that in the year 1816 one William E. Daughtry was appointed by the County Court of Hertford guardian to the petitioner, Mary, then an infant of very tender years, and executed a bond to certain justices, whom the petition named, in the penal sum of ten thousand dollars, or some other large sum sufficient to cover the amount of the property of his ward, and conditioned for the faithful discharge of his duties as guardian; that John Maget and William M. Daughtry executed the said bond and sureties with the said guardian; that the said guardian had died insolvent, and that there was no representative of his estate; that William M. Daughtry was also dead, and there was no representative of his estate; and that John Maget had died intestate, and the defendant, Nicholas Maget, was administrator of his estate and had received assets of his intestate into his hands to the amount of twenty thousand dollars, or some other large sum. The petition averred that Daughtry, the guardian, had wasted the property of his ward to a large amount, which he had got into his possession by virtue of his said appointment, and prayed that the defend-
(416) ant might be compelled to answer, on oath, all these allegations, and that the petitioners might have such remedy and relief as their case might require and the ends of justice demand. To this petition the defendant put in an

answer, in which he admitted that he had administered on the estate of John Maget and taken into his possession the personal estate of his intestate, and averred that, after paying such debts as he was apprised of against the estate, he had distributed it between the wife and children of his intestate before he had any notice of the demand of the petitioners. The answer stated that the defendant believed that William E. Daughtry was appointed guardian, in the year 1816, to the petitioner, Mary, but insisted that a subsequent guardian was appointed in 1821 or 1822, who had a settlement with Daughtry of his guardianship and took a deed of trust upon his property to secure the amount thereon due, sold the property for the satisfaction thereof, and applied, or ought to have applied, the proceeds to that purpose. It then proceeded thus: "This defendant, acting in a fiduciary character, and not knowing any of the facts by which he should be made liable, prays that the petitioners be put to strict proof of the execution of the bond mentioned in the petition, and what was the condition thereof, if any, and all other matters and things not herein admitted to be true." The answer contained other matters which it is unnecessary to state, as they are irrelevant to the questions upon which the case turned.

After various dilatory proceedings, at the Fall Term, 1834, of Hertford Superior Court, before his Honor, *Judge Strange,* an issue of fact was ordered to be made up and submitted to a jury, to-wit, "whether the defendant's intestate, John Maget, executed the bond described in the petition." Upon the trial of this issue the Clerk of the County Court was introduced as a witness by the petitioners, who testified that within a year before the burning of the court-house he had been applied to, in writing, by the attorney of the petitioners, for information respecting the guardian bond of Daughtry, to enable him to bring suit upon it. A letter was then shown to the witness, which he declared to have been written by him in answer and containing the information requested, the contents whereof the witness also (417) declared he believed to be true. The witness was allowed to examine the letter to refresh his memory, and afterwards stated that he remembered to have searched among the papers of his office, in compliance with this application

from the attorney of the petitioners, and to have found a paper, printed, except as to those parts which are usually left blank to be filled up with writing, purporting to be the guardian bond of William E. Daughtry, signed by Daughtry in his proper handwriting, and purporting also to be signed by the defendant's intestate; that whether it was actually signed by him or not the witness could not say, but, from a slight knowledge of his handwriting, he took it for granted at the time that it was *his;* that he thought a certain man, then dead, was the subscribing witness, but said nothing as to the identity of *his* signature. He did not read the bond over, and of course could not state its contents; he did not remember the penalty of the bond or the persons to whom it was payable. The petitioners then offered to read the letter of the clerk, so authenticated, in order to show the penalty of the bond and the name of the justices to whom it was made payable. The letter did not profess to set forth the copy of the bond, but stated the facts of the appointment of Daughtry as guardian at such a term, and of his entering into a bond in a stated amount; and stated also the names of his securities to the bond and the names of the justices to whom it was made payable. The reading of the letter was objected to by the defendant and refused by the Court.

His Honor instructed the jury "that both at law and equity the plaintiff's proof, to entitle him to relief, must support his allegation; that the petitioners in this case had alleged the execution by the defendant of a bond answering a certain description, and it was for them to determine whether any satisfactory proof had been offered to enable them to find the affirmative of the issue submitted to them; that that issue was, whether the defendant's intestate had executed the bond described in the petition; that the
(418) bond described in the petition was one signed by certain persons, payable to certain justices, and for ten thousand dollars, or some other large sum; that even if they were satisfied that some bond had been executed by the defendant's intestate, in the absence of all proof that it was payable to the persons mentioned in the petition, could they say that it was the bond mentioned in the petition? And, further, if they were satisfied that it was payable to the persons mentioned in the petition, the next question would be

for what amount it had been executed; and a verdict that a bond had been executed, without specifying the amount, or reference to anything by which its amount could be rendered certain, would be entirely nugatory." The jury returned a verdict "that the defendant's intestate did not execute the bond mentioned in the petition." A motion was made for a new trial of the issue because of the rejection by his Honor of evidence offered by the plaintiffs and proper to be submitted to the jury, and because of misdirection to the jury on the trial of the issue. This motion being refused, and the petition dismissed, the plaintiffs appealed.

Kinnie, for the plaintiffs.
Iredell and *Badger,* for the defendant.

GASTON, J., after stating the case, proceeded: We have felt some difficulty, in the consideration of this cause, on a point which was not discussed nor raised upon the argument. It is, of course, the duty of courts to carry out into full execution the legislative will, so far as they can collect it. In the act by which the proceedings in this case profess to be regulated it is declared with sufficient plainness that persons who are interested in the various office bonds which are taken by the Court, and who deem themselves injured by a breach of their conditions, may institute suits in their own name in the form of a petition; that the defendants shall answer to the petitions upon oath, and that finally the Court shall decree such remedy thereon as the nature of the case shall require and the ends of justice may demand. In these respects the method of proceeding seems analogous to that which obtains in our equity jurisprudence. But (419) the act also provides that parol evidence shall be heard and that "the process" shall be in a *summary* way. We have doubted whether *these* provisions do not indicate a reference to the common-law mode of proceeding. At law all the allegations of a plaintiff not answered by the defendant's plea are confessed. In equity the charges not admitted by the answer are put in issue. Are we to consider the fact, alleged in the petition, of the execution of the guardian bond by the defendants, confessed or denied? If the practice at law is to prevail, unquestionably its execution has not

been denied. There is no averment that the allegation of the petitioners is in this respect untrue. The execution of the bond has not been put in issue, the verdict of the jury is irrelevant, and the petitioners have a right to proceed with their case, notwithstanding that verdict. If the equity practice should obtain, the defendant's answer as to the execution of the bond was manifestly insufficient. He was bound to answer, not only as to his knowledge, but also as to his information and belief. He had no right in conscience to require that the petitioners should be put to strict proof, or to any proof, of an allegation which he believed to be true. If, indeed, he was not only personally ignorant of the matter charged, but had no information to warrant him in forming a belief in respect to it, he might properly have so answered, and then have required that the petitioners should be put to proof thereof. But the regular course, where an answer is evasive or insufficient, is to except to the answer and compel a full and direct one. Unless this be done, the plaintiff is under the necessity of proving every material averment in his bill which has not been admitted by the defendant, although the same amount of proof is not required as is indispensable when the averment has been denied. The legislative intention on this point is not clearly seen; but we think it reasonable to infer, and therefore we do so decide, that as the defendant was compelled to make his defense in the form prescribed by the usages of equity, the effect of that defense should be such as by those usages belongs to it, and the trial of the matters put in issue therein should conform thereto.

(420) It was then competent for the Court below to order an issue to ascertain the truth of any matters charged, upon which the conscience of the Court required to be informed. We disapprove of the terms in which the issue submitted to the jury was expressed, if those terms be designed (as from the charge of the Judge it appears they were) to restrict inquiry to a bond *precisely* corresponding with that described in the petition. According to the most rigorous course of equity practice, no more is necessary to be proved of the matter charged than what makes out the plaintiff's claim to relief. All the light which the conscience of the Court needed on this part of the matter in controversy was information whether the defendant's intestate had exe-

cuted a bond for the petitioner, Mary, as surety for her guardian, and if so, then to what amount the penalty extended. If he had, the claim of the petitioners was precisely the same, whatever might be the names of the justices to whom it was formally made payable. Nor was the exact amount of the penalty material. It was important only to know what sum was certainly covered by it, for that *beyond* that sum liability for the guardian's misconduct did not attach to the defendant's intestate. As the issues in equity are made up by the Court itself for the satisfaction of the Court, and to be tried before the Court itself, that in question should have been so modified or the jury so instructed upon it as to enable them to find the truth of what was material only, and not defeat the great purpose of the inquiry by confining their attention to what was formal and unessential. Perhaps the issue as *expressed* did not warrant the part of the charge excepted to, and the relief of the petitioners on account of the injury in this respect sustained might be to reverse the decree of dismission and send the cause back for further inquiry whether *any* guardian bond—and if any, *what* bond given by William E. Daughtry as guardian for the petitioner, Mary—was executed by the defendant's intestate. But it is unnecessary to decide this matter distinctly, as, for other reasons, an *alias venire* must be ordered.

The finding on the issue is conclusive of the particular fact so found, unless the petitioners have just matter of exception because of the evidence offered and rejected. (421) The issue, though single, embraced several matters of inquiry. That the guardian bond, if it ever existed, had been destroyed, was not a matter to be controverted, for that was declared by the act of the Legislature, and a statute is conclusive as to all public facts which it recites. *Rex v. Sutton,* 4 Man. & Selw., 553. But it was to be inquired, first, whether such a bond had ever been given; secondly, if given, whether the defendant's intestate was one of the obligors; and, finally, what were the contracts or terms of the bond. The appointment of Daughtry as guardian was admitted in the pleadings, and upon that appointment a legal presumption arose that he executed a guardian bond, since such a bond is made a pre-requisite to the appointment. The next

inquiry in order was whether the defendant's intestate was a party to the bond. The testimony offered on this part of the controversy was received by the Judge and submitted to the jury, but it has here been insisted in argument that it was so slight as not to amount to the character of *evidence* and to lay no foundation for proving the contents of the bond. We are of opinion not only that there was evidence of the execution of the bond by the intestate proper to be submitted to the jury, but evidence which, if believed and not contradicted nor explained away, warranted the finding of the fact. The instrument in question was not a private, unauthenticated paper belonging to the petitioners, which had been lost by them, or by those to whom they had entrusted its custody; it was a bond taken under the act for the better care of orphans and security and management of their estates. By that act authority is given to the courts to take cognizance of the estates of orphans and to appoint guardians to them where it shall be necessary. The justices holding such courts are required to take good security of all guardians by them to be appointed, under the penalty of being themselves responsible for all damages sustained by the orphan for the want of such security. It is further directed that the bond shall be made payable to the justices present in court granting such guardianship, the survivors or survivor of them, their executors or administrators, for the benefit of (422) the orphan, and that the bond shall be acknowledged in court and caused to be recorded. The instrument which was the subject of inquiry was an obligation of this character taken by a court in the exercise of a most important power over the estate of an individual incompetent to give consent, acknowledged in court, ordered to be recorded as a perpetual memorial of the engagement therein contained, and deposited among the records and documents of the court. It is not in its form a recognizance. It is so like it, however, in substance, that perhaps it would have been doubtful what was the appropriate remedy to be pursued upon it had not the same act plainly indicated it. The act goes on to provide that in the name of the justices to whom it is made payable, the survivor or survivors of them, their executors or administrators, any person injured may and shall, at his costs and charges, commence and prosecute a suit against

such guardian and his securities, executors or administrators, and shall and may recover all damages which he has sustained by the breach of the condition. It still, therefore, retains its legal character of a bond, is to be sued on as a bond, and is open to the legal defenses which may be made against it as such. When a suit is brought its execution may be denied by plea, for it does not import *absolute verity.* But it is yet a document partaking of a public nature, taken by public authority, having a high character of authenticity, and it requires not that it should be verified by the ordinary tests of truth applied to merely private instruments, the obligation of an oath and the power of cross-examining witnesses on whose veracity the truth of such instruments depends. Confidence is due to it because of the authority of the court by whom it was taken, and whom the State, in discharge of the parental duties it owes to orphans, has empowered to take it. "Where particular facts are inquired into and ordered to be recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the public, and every member of the community may be supposed privy to the investigation." Stark. Evi., 195. *Prima facie,* the document is true. Imposition may have been practiced on the Court, (423) but it is not to be presumed. If the original be lost, unquestionably the recorded copy of it would be evidence. It would be an absurdity to suppose that the law had ordered that to be recorded which bore not the stamp of truth and had no claim to credit. If both the original and record be lost, the loss may be supplied by proof that they did exist. Whether the original be produced or the record exhibited, or where neither remains, and the existence is shown of the original as a document acknowledged in court, recognized as such by the act of the court, and preserved as such among the public muniments in the proper repository, no more is then demanded to make out the affirmative of the issue than evidence of identity.

In this case evidence tending not only to establish the identity of the defendant's intestate with the individual named as one of the obligors, but to establish the actual execution of the instrument by him, was given; and this was

done where the defendant had not ventured to say that he disbelieved the fact of execution by his intestate, nor that he doubted of it, but only that he was not personally cognizant of the facts. The remaining inquiry on the trial of the issue was as to the contents of the bond, and we are of opinion that for that purpose the letter of the clerk containing an abstract of the bond was competent evidence. When the subject of investigation is the occurrence of certain supposed matters in relation to which a witness professes to possess personal knowledge, he must testify fully to the best of his recollection. To bring back any forgotten circumstance, to restore a broken link of recollection, to refresh his memory, he may be allowed the aid of a former memorandum; but if, after this help, he obtains no remembrance of facts distinct from the memorandum, he is not admitted to *testify* to them. If that which is offered to refresh his memory be itself proper testimony, it is better than any statement he can make founded solely upon it; and if it be not, as generally it is not, because not given under the solemn sanction of an oath, publicly, in court, and with the securities for truth pre-
(424) sented by a cross-examination, it does not become so by being then narrated by the witness. It is obvious that the Court below, in rejecting the letter, acted upon this rule of evidence. But to us it appears that this rule does not apply where there is no question as to facts originally entrusted to memory and afterwards obliterated by time, but where the question simply is as to the contents of a written paper once existing but since destroyed. Beyond doubt, a copy verified in court by the oath of the copyist to have been taken by himself from the original would be more deserving of reliance, and therefore of higher dignity in the scale of evidence, than his recollection of the contents. In either case he pretends not to testify to facts, either as an eye or ear witness of them, but to declare only what the document testified—to give, in the absence of the original, a faithful resemblance of it, and the copy which was written with the original before him is better than that which he is then to make out from memory. In the former there is less danger of error. The *impression* is there made in durable and unchangeable characters, while in the latter it is faint and evanescent, and, in a measure at least, taken from the for-

mer. In both, our reliance for fidelity of resemblance must be placed upon the oath of him from whom each alike proceeds. If a full written copy be preferred to a *professed* full recollection, the same preference is due to an *abstract* or a copy in part over a professed remembrance to the same extent. The former, so far as it goes, has the same superior advantages of durability and unchangeableness over frail memory, and is equally verified by the oath of the witness. It should be exhibited to him, not as an *aid* to his memory—for, so far as it goes, it is more worthy of confidence than his memory—but for the purpose of being authenticated by him as having been faithfully taken. If his memory extend beyond what is given in the abstract, then the former may be resorted to, not as more certain, but as more full, to supply the deficiencies of the latter. This order in the rank of evidence is distinctly recognized by *Mr. Starkie* in speaking as to the proof of lost deeds. Stark. Ev., 341. "After proof of the due execution of the original, the contents should be proved by means of a *counterpart,* if (425) there be one, for this is the next best evidence, and it seems that no evidence of a mere copy is admissible until proof has been given that the counterpart cannot be produced, although such counterpart was not stamped. If there be no counterpart, a *copy* may be proved in evidence by any witness who knows that it is a copy from having compared it with the original. If there be no copy the party may produce an *abstract* or give in evidence a deed executed by the adversary in which the instrument is recited, or *even* give parol evidence of the contents of a deed."

It is the opinion of this Court that the decree of dismission be reversed and the verdict of the jury set aside, and that the Court below should order an *alias venire* issue to try the matters of fact controverted in the cause, which it cannot satisfactorily ascertain without the aid of a jury.

PER CURIAM. Decree reversed and new trial ordered.

Cited: Short v. Currie, 53 N. C., 43; *Harrell v. Hare,* 70 N. C., 661; *Hare v. Holloman,* 94 N. C., 19; *Battle v. Baird,* 118 N. C., 860.

DEN ex dem. of WILLIAM HURLEY v. HARDY MORGAN.

1. The meaning of a deed as to what land it covers is a question of law to be decided by the Court. *What* are the *termini* of the lines are points of construction; *where they* are, questions of fact. Therefore, it was *held*, to be error for the Judge to instruct the jury that, where there was an irreconcilable difference between a natural boundary and a marked line, it was matter of evidence and not of construction.

2. As a general rule, in questions of boundary, a natural object has a preference over marked lines or corners, and will control them when the natural object is of such a nature as cannot easily be mistaken by the parties, either in name or situation, as in the case of a river or creek. But the reason of this rule does not apply to very small streams, which either have no names or have formerly had a different name from that which they now bear. With respect to these, it is open to evidence *which stream* the parties meant by a particular name; and the jury, if satisfied of the fact, from proof of possession or the like, may find a stream to be the one meant, although not the one bearing the name mentioned in the deed.

EJECTMENT, brought to recover the possession of a tract of land; and upon the trial at DAVIDSON, on the last Spring Circuit, before his Honor, *Judge Martin*, the lessor (426) of the plaintiff produced the following evidence of title to the land mentioned in his declaration:

In July, 1774, a grant issued to Charles Thompson for one hundred acres of land, described as "beginning at a stake among three small hickory saplings, pointers, standing on the northeast side of Barnes' creek, at the mouth of the Rocky branch; thence N. 10° E. 127 poles to a black-oak; then N. 80° W. 127 poles to a pine; then S. 10° W. 127 poles; then S. 80° E. 127 poles to the beginning. The plat annexed to the grant and signed by James Cotton as surveyor reversed the east and west lines of the grant, so that by the calls of the grant the land lay on the west side of Barnes' creek, but according to the plat it would lie on the east side of that creek, the general course of which is nearly south. The warrant of survey upon which the grant issued bore date in 1772, and directed the survey to be made on the mouth of the Rocky branch of Barnes' creek. Thompson conveyed to James Cotton (the surveyor) in October, 1774, describing the land as it was described in the grant, with the following additional particulars, to-wit, "including the plantation and

mill whereon I now live." From Cotton a regular and connected chain of conveyances was shown down to the plaintiff, in each of which deeds the same boundary was called for as that contained in the original grant. The dates of the *mesne* conveyances from Cotton to the lessor of the plaintiff were 1786, 1789, 1817 and 1826.

It appeared from the evidence that the Rocky branch entered into Barnes' creek about one-fourth of a mile north of the northern line of the land claimed by the plaintiff's lessor. It appeared also that Charles Thompson, before his conveyance to Cotton in 1774, had built a mill, erected a dwelling-house and cleared a plantation on the land now claimed, and that a continued possession of the plantation had been maintained by the plaintiff's lessor, and those under whom he claimed, until a short time before the entry and possession of the defendant. The mill had decayed and disappeared many years ago.

It did not appear that a mark was found upon any tree corresponding in age with the date of the survey or the grant, but it was shown that a survey had been (427) made thirty-one or thirty-two years before this suit was brought, the object of which was to find vacant land; and at that time a white-oak, now insisted on as the third corner from the beginning of the original survey, had then marks as a corner of considerable age upon it. It was also shown that the white-oak had been since killed by fire; that a red-oak was found marked as a corner at the place claimed by the plaintiff's lessor as the first corner from the beginning. At the second corner from the beginning there was a post-oak which either had been before or was then marked as a corner, when one of the conveyances under which the lessor of the plaintiff claimed, to-wit, that of 1817, was made, as it appeared that the land now claimed was run for the purpose of making that deed. After offering some other evidence tending to establish one of the corners, the plaintiff's lessor produced two grants for lands adjoining that now claimed and calling for the lines of the tract as claimed by him—one issued in the year 1791 and calling for the third and fourth lines; the other in 1801, calling for and proved to have been run according to one of the lines now contended for. A grant was also shown of a tract of land to James Cotton (the

surveyor of the land granted to Thompson), which was issued upon a survey made by Cotton himself in 1772, about six months after his survey for Thompson; and, according to the calls of that grant, nearly the whole of the land granted to Thompson would be included in it if the beginning of Thompson's tract were at the mouth of the Rocky branch.

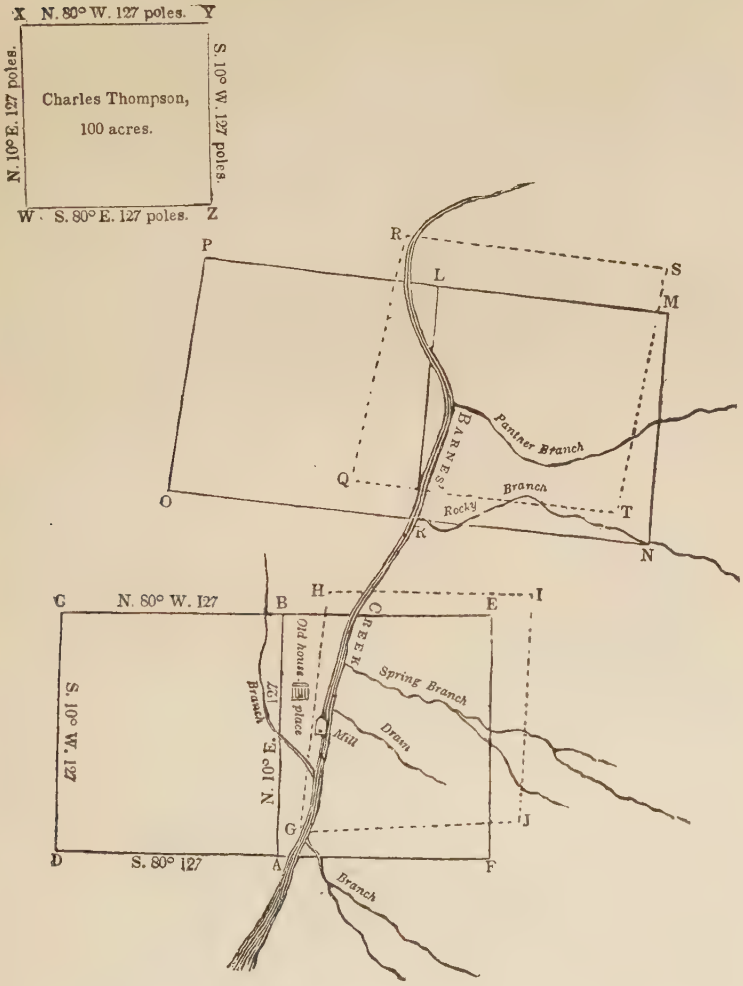
If the mouth of the Rocky branch be the beginning of the grant to Thompson, the land in dispute was not within the boundaries of it. If the courses and distances set forth in the grant be followed, the land in dispute would not be covered by them, although the beginning be lower down the creek than the mouth of Rocky branch and be where plaintiff's lessor contended it was. The suit was commenced in 1829, and a continued possession by the plaintiff's lessor, and those under whom he claimed, of fifty-six years, was proved.

A plat explanatory of the case was made part of it, and is represented by the annexed diagram.

(428) His Honor, upon this evidence, instructed the jury "that, by construction, no preference was given to a natural boundary over a marked line; but where there was in the grant a double description by natural boundary and marked line, it was a question of evidence to the jury, where the two were variant and irreconcilable, and in such a case they must decide which boundary would include the land intended to be granted. The course and distance in the grant must be followed, unless there was a line run and trees marked by the surveyor when the land was surveyed for the grant. A plat variant from the courses in a grant would not control it."

He also charged that a grant was presumed to have been issued for land after thirty years possession, but that such presumption, even after a longer possession, might be repelled by evidence to the contrary; that in this case the presumption was opposed by the averments of the plaintiff's lessor that the grant and *mesne* conveyances under which he claimed covered the land in dispute; that the jury must decide between the presumption of a grant from the length of possession and the evidence adduced by the plaintiff himself tending to repel it, whether in fact a grant ever did issue. If no grant could be presumed, and the land in dispute was not included in the grant and conveyances produced by the plain-

DIAGRAM. (429)



In the diagram the land claimed by the plaintiff is represented by A, B, E, F.

The land, according to the courses and distances of plaintiff's title deeds, is represented by A, B, C, D.

If run off from the mouth of the Rocky Branch, the land will be represented by K, L, M, N, or K, L, P, O, according as the East and West courses are assumed.

G, H, I, J, represents the tract, if the beginning be opposite the mouth of a small branch, near which the plaintiff alleges the corner to be.

Q. R, S, T, represents the land granted to James Cotton, upon his own survey, in the year 1772.

W, X, Y, Z, is a copy of the plat annexed to Charles Thompson's grant.

tiff's lessor, the jury were directed to find for the defendant, but otherwise to find for the plaintiff. A verdict was returned for the plaintiff, and a motion for a new trial was submitted by the defendant on the ground that the Judge had erred in instructing the jury that it was a matter of evidence, and not of construction, where an irreconcilable difference existed between a natural boundary and a marked line, whereas they should have been told that a natural boundary had a preference, as a matter of law, over a marked line. His Honor admitted the error, and would have granted a new trial, but it was agreed by the parties that in order to have the questions growing out of the case as stated above settled by the Supreme Court, the new trial should be refused, upon which being done the defendant appealed.

(430) *Nash,* for the defendant.
Mendenhall, contra.

RUFFIN, C. J. We concur in the opinion expressed by his Honor that he erred in leaving the construction of the patent to the jury, to be decided by them upon the evidence. The meaning of a deed as to what land it covers, or as to what estate it conveys, is equally a question of law, and therefore is to be decided by the Court. *What* are the *termini* of the lines are points of construction; *where they* are, questions of fact. These observations are found in so many cases as to be familiar without particular references.

From the manner in which the case is stated, the Court supposes that the object of the appeal was not alone to obtain a new trial, but also an opinion upon the points on which the next trial is expected to turn. So far as they relate to matters of law we will give it.

We likewise think that where a natural boundary is called for, and marked lines found (especially if they be not called for as found), the natural object, as the most conspicuous, certain and permanent, not subject to alteration or destruction, is the most essential part of the description, and more perfectly identifies the land than any other. It has, indeed, been held that where trees, as well as natural boundary, are called for in the deed, and the trees are found and identified, they cannot control the other call, but must yield to it, as in

Sandifer v. Foster, 2 N. C., 237, and *Harris v. Powell,* 3 N. C., 349. As a general rule, we assent to the doctrine of those cases. There the natural objects called for were a creek and a river, about which the parties can scarcely be under a mistake as to their situation or name. But the same reason does not apply to very small streams which have no name or may be known by different names at a remote and recent period; and in such a case—of which the present seems to be probably a strong example, we have no doubt—it is open to proof upon direct evidence that two *branches* have borne the same name, or, upon circumstances of possession and the like, that the parties have mistaken the name of the particular one which they intended to make an (431) abuttal of the land. Under such circumstances it is a proper instruction to the jury that they must inquire *which* stream the parties call—for instance, "the Rocky branch"—and that the one thus meant is *the* Rocky branch which is the true terminus. The opinion of *Judge Henderson* in the case of *Cherry v. Slade,* 7 N. C., 82-96, exhibits our views fully, and the doctrine was practically asserted in the case of *"the Cat-tail and Meadow branch,"* which is mentioned by him and was familiar to the profession who were in practice twenty-five years ago. In the present case there appears upon the map to be no less than six small streams emptying into the creek within less than a mile, and but one of them is now known by the particular name mentioned in the deed. But the possession taken by Thompson, the grantee, even before the grant issued, and his building a dwelling-house and mill, his conveying to Cotton (who made the survey for him) in October, 1774 (three months after the date of the patent), by the same description, with the addition, "including the plantation whereon I now live, with my mills and improvements, and being a tract or parcel of land granted to me by his Majesty's letters-patent, bearing date," etc.; the possession taken by Cotton and continued by him, and those claiming under him, for fifty-six years; the reputation of the boundaries according to known and visible objects, recognized and called for as such, upwards of forty years, in conveyances of adjacent tracts of land, altogether form a chain of concurring circumstances the force of which it would seem that nothing could repel, and which, if not repelled, establish the

branch near which the survey, as claimed by the plaintiff's lessor began, to be that called for as "the Rocky branch." The naked possession would almost prove it, did it stand alone, but when supported by the other facts it seems to be put beyond a question. The same circumstances, together with the form of the plat and the marked trees, show that the calls of the patent for courses reverse the courses actually run; and under that class of cases, of which *Person v. Roundtree,* 1 N. C., 69; s. c., 2 N. C., 378 (cited in *Bradford v. Hill,* 2 N. C., 22), is the leading one, the patentee
(432) may hold the land actually surveyed. It is true the plat cannot control, of itself, the words of the body of the grant, but it is by law annexed to the grant, and always referred to therein as being annexed. When, therefore, it appears from it that the land surveyed is on the east side of the first line, it is a circumstance, with others, from which it may be inferred that in the certificate of the courses the surveyor reversed them by mistake, so as to transpose the land and place it on the west side of that line.

The Court is therefore very reluctant to set aside a verdict which appears to us to be so just that one to the contrary can never be expected from any jury. But, as the Superior Court did, in our opinion, err, and the defendant insists on not being bound by the verdict, we cannot withhold a right which strictly belongs to him; for we cannot tell upon what ground the jury found, and the point on which we think they ought to have found for the plaintiff involves an inquiry of fact on which this Court cannot anticipate their opinion.

This result renders it unnecessary that an opinion should be given upon the views entertained by his Honor upon the subject of the presumption of conveyances. Lest they should be deemed those of this Court, however, we cannot forbear from expressing in general terms our dissent from them. We deem it entirely incorrect to hold that a party who upon the trial of a cause in which he asserts a title to the thing in dispute offers an *argument* that a particular deed vested the title in him is precluded, either by way of estoppel or presumption, from insisting that another deed shown in evidence or presumed did thus vest it. The ground and nature of the presumption was, we think, mistaken by his Honor. It is, indeed, a presumption of fact to be deduced by the jury, but

it is deduced upon legal principles, and may properly be found, and in many cases ought to be found, although the jury and Court may be satisfied that it never was in fact made; and the Court may advise the jury in proper cases that reason and the law requires them to make it, unless the contrary be proved, in the same manner that they are instructed that killing under certain circumstances is a killing *with malice,* or that they *ought* to find a *conversion* upon evidence of a demand and refusal, if there be (433) nothing more. As the case does not turn on this question, we deem it useless to pursue it further. In the particular circumstances of this case the lessor of the plaintiff could not probably avail himself of the presumption that a grant had issued containing proper descriptions of the land claimed by him, because his own title was a recent one and by a description in conformity to that in the patent of 1774 The effect of the circumstances, so far as he could use them, is rather to show what are the true boundaries of the grant of 1774 than that another one issued. As that is so, the case must go to another trial.

PER CURIAM. Judgment reversed.

Cited: Becton v. Chesnut, 20 N. C., 482; *Literary Fund v. Clark,* 31 N. C., 63; *Bullard v. Barksdale,* 33 N. C., 468; *Marshall v. Fisher,* 46 N. C., 117; *Cooper v. White, Id.,* 392; *Waters v. Simmons,* 52 N. C., 546; *Strickland v. Draughan,* 88 N. C., 318; *Brittain v. Daniels,* 94 N. C., 784; *Redmond v. Stepp,* 100 N. C., 219; *Wilhelm v. Burleyson,* 106 N. C., 388; *Brown v. House,* 118 N. C., 881; *Higdon v. Rice,* 119 N. C., 626, 634; *Bowen v. Gaylord,* 122 N. C., 820.

MEMORANDUM.

At the last session of the General Assembly JOHN M. DICK, ESQ., of Guilford County, and ROMULUS M. SAUNDERS, ESQ., of the city of Raleigh, were elected Judges of the Superior Courts of Law and Equity for this State; the former in the place of *Judge Seawell,* deceased, and the latter in the place of *Judge Martin,* resigned.

JUNE TERM, 1836.

FREDERICK STEED v. DANIEL McRAE.

1. The forfeiture imposed upon an overseer by the Act of 1741 (Rev., ch. 35, sec. 22), for leaving his employer's service during the time for which he was employed, does not attach to a case where by the stipulations of the parties the overseer may leave, or the defendant may discharge him, at pleasure.

2. A contract for service as an overseer, in which it is stipulated that the overseer may leave his employer's service, or the employer may discharge the overseer, at pleasure, will be construed so as to give the overseer a *pro rata* compensation during the time he may serve.

THIS was an action of ASSUMPSIT, brought by the plaintiff to recover the value of a share of the crop raised in the year 1832 upon the defendant's farm, where the plaintiff was employed as overseer. Upon the trial, at MONTGOMERY, on the last circuit, before his Honor, *Judge Norwood,* it appeared that the plaintiff had contracted with the defendant to serve him as overseer during the year 1832, for which defendant was to pay him one hundred and twenty-five dollars, or a certain share of the crop, at the election of the plaintiff; and it was stipulated between the parties that either of them might put an end to the contract at any time he might think proper, viz., that the plaintiff might leave the de-
(436) fendant's employ, or the defendant might discharge the plaintiff at pleasure. It appeared, further, that the plaintiff commenced his services as overseer on the first day of January of that year, and that he remained upon the farm until the crop had been made, housed and ready for market; but on 15 December he apprised the defendant of his intention to leave his service, and accordingly did leave before the end of the year. There was also some evidence showing that the defendant had another farm, at which he had one Duncan McRae as overseer, and that the hands on the two farms were sometimes seen exchanging work. Upon this testimony the defendant's counsel contended, first, that the plaintiff was barred from recovery by the Act of 1741 (Rev., ch. 35, sec. 22); and, secondly, that there was no contract between the defendant and plaintiff only, but that the contract was with the two overseers jointly as partners. His Honor overruled the first objection and charged the jury that

there was no evidence to support the second; whereupon a verdict was rendered for the plaintiff, and the defendant appealed.

No counsel appeared for the defendant.
Mendenhall, for the plaintiff.

DANIEL, J. The Act of 1741 (Rev., ch. 35, sec. 22) declares that if an overseer shall depart from the service of his employer before the time mentioned in his agreement or contract shall be expired, he shall for such offense forfeit his right and title to his wages or share of the produce. The plaintiff in this case did leave the service of the defendant about fifteen days before the end of the year during which he had contracted to act as overseer. But it was stipulated by the parties to the agreement that the plaintiff might leave the defendant's employ, or the defendant might discharge the plaintiff when either of them saw proper to do so; therefore the forfeiture under the Act of 1741 was not incurred by the plaintiff's leaving the defendant's farm before the expiration of the year. The forfeiture seems to have been guarded against by the very terms of the contract. The case does not state what was to be the effect provided the overseer left the farm before the expiration of the year; it is (437) obscure on this point. We do not, however, discover any understanding between the parties that the overseer should abandon or relinquish his claim for services in that event. We are induced to construe the contract (as we gather it from the case) to be, that the overseer might leave the farm, or his employer might discharge him at any time during the year upon a *pro rata* satisfaction for the time he should continue. A different construction would have enabled the defendant to discharge the plaintiff when the principal part of the labor was over, and so rescind the express contract and avoid any liability under it which would be manifestly unjust.

The second objection taken to the plaintiff's recovery, viz., that the contract was made by the defendant with the plaintiff jointly with Duncan McRae, the other overseer, or with them as partners, has not a particle of evidence to support it;

and the Judge was authorized to inform the jury in his charge that there was no evidence in the case upon that point. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

GEORGE A. GRAY v. NATHAN O. BOWLS.

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be satisfied; and therefore, if a surety to the forthcoming bond before it is forfeited discharges the execution without the request of his principal, such surety cannot maintain an action against his principal for money expended for the latter's use, although by the payment of the money in satisfaction of the execution the bond was discharged.

ASSUMPSIT, tried at MECKLENBURG, on the last circuit, before his Honor, *Judge Strange*. Upon the trial it appeared in evidence that the defendant had in his possession and claimed title to a slave which was levied on under an execution against another person. Being about to remove to the West, he at first intimated an intention to pay off this execution and take the negro with him. The plaintiff, to
(438) enable him to execute this intention, offered to lend him the money, but the defendant declined the offer, declaring then his determination to execute a forthcoming bond to the officer, carry away the negro and suffer the bond to become absolute. The plaintiff, upon this declaration, joined the defendant as a surety in a forthcoming bond, and, before the day appointed for the forthcoming of the property, paid off the execution and then sued the defendant for the money so paid as having been expended for his use and at his instance and request.

The plaintiff's counsel contended, first, that there was evidence from which the jury might infer an express promise of indemnity; and, secondly, that if the jury were not satisfied of any such express agreement, yet if in point of fact the plaintiff had paid the money and the bond had been forfeited, the plaintiff being responsible and liable to be compelled to pay by suit, the law implied a promise of indemnity

on the part of the defendant, although the plaintiff had not awaited the issue of legal compulsion. His Honor left the case to the jury on the first point to find an express promise of indemnity if the evidence should satisfy them that it was in fact made; and charged them upon the second point "that, although the money was paid before the forfeiture of the bond, yet if it was in fact paid upon an anticipated liability which in the event did fall upon the plaintiff previously to bringing his action, he was entitled to recover"; but that if there was an understanding between the plaintiff and defendant that the money was not to be paid except at the end of a lawsuit, the plaintiff could not, by advancing his money, entitle himself to recover of the defendant. The jury returned a verdict for the plaintiff, and the defendant appealed.

No counsel appeared for the plaintiff in this Court.

D. F. Caldwell, for the defendant, contended: 1. That there was no evidence in relation to an express promise of indemnity, and that the Judge should have so instructed the jury; that the charge was calculated to mislead them, for, the consideration being past, an express promise or a previous request should have been proved. 2. That no man has a right to make himself the creditor of an- (439) other without his consent or against his will. *Gregory v. Hooker,* 8 N. C., 394; 2 Stark. Ev., 101, 102; *Stokes v. Lewis,* 1 Term., 20; Chitty on Con., 178, 13, 14. In the case of a dishonored bill *after* its protest, a friend may pay for the honor of the drawer, but this is an exception, and perhaps the only exception, to the general rule.

GASTON, J. We regret that this case has not been argued on the part of the plaintiff, as possibly that argument might have enabled us to see it in other lights than those cast upon it by our unaided reflections. It seems to us that the instructions given to the jury were erroneous. (His Honor here stated briefly the facts of the case as above, and proceeded).

We can discover in the case no evidence of any express contract between the plaintiff and the defendant, and so we think the jury should have been instructed. There is,

indeed, evidence of an implied contract. As the plaintiff executed the forthcoming bond as surety for the defendant, the law implies that the defendant engaged to indemnify the plaintiff against the responsibility thereby incurred. But it implies no further promise. According to our law (Act of 1807, Rev., ch. 751) the sole object of the forthcoming bond is the indemnity of the officer, who, after delivery of the property remains liable to the plaintiff in execution, in all respects as though he had retained it in his hands. By the bond no obligation is imposed to pay off the execution. If, indeed, the defendant in the execution, or any other person, should pay it off, the bond is necessarily extinguished, because it is given for "the forthcoming of the property to answer the said execution or process." When another than the defendant in the execution satisfies it, the money is paid to the use of such defendant, and not to that of the obligors. But even as against *him* an action cannot be maintained unless it appear that the payment was at his request, express or implied.

Had the bond in this case become absolute there would then have been room for the question on which the
(440) Judge charged the jury, whether the plaintiff could rightfully satisfy the damages thereby incurred before the amount had been ascertained by a judicial decision. It is not necessary for us to pass upon it, though we presume the general rule to be, as the Judge understood it, that when the engagement of the surety has become absolute by the default of his principal, he may pay without awaiting a suit, and what is thus paid, if it exceed not his legal liability, will be regarded as expended for the use, and at the instance and request of his principal. But here the plaintiff advanced what the defendant had not engaged to pay. Whether the defendant intended to contest the liability of the slave to the execution, or contemplated that the judgment debtor, or some one on his behalf would satisfy the judgment, or whatever might be his purpose for preferring to give a forthcoming bond, he chose to incur the liability attached to that bond; and the plaintiff, at his instance and request, also incurred the same liability. The plaintiff has sustained no loss and paid no money because of that liability. We feel ourselves bound, then, to say, that the money expended under the cir-

cumstances of this case, was not money expended for the use, nor at the request of the defendant. The judgment is reversed with costs, and an *alias venire* must be awarded.

PER CURIAM. Judgment reversed.

Cited: Roberts v. Scales, 23 N. C., 93.

ROLAND DUNCAN v. WILLIAM STALCUP.

In the action of trespass *vi et armis*, for the destruction of or injury to chattels, the jury are not restricted in their assessment of damages to the mere pecuniary loss sustained by the plaintiff, but may award damages for the malicious conduct of the defendant, and the degree of insult with which the trespass was committed.

TRESPASS VI ET ARMIS, for shooting the plaintiff's dogs and cattle, killing his horses and hogs, and burning his stables and fodder stacks.

On the trial, before his Honor, *Judge Strange,* at BURKE, on the last circuit, the plaintiff having proved his case, the jury were instructed, that in assessing dam- (441) ages, they were not restricted to the actual value of the property destroyed, but might in their discretion award vindictive damages. A verdict being returned in favor of the plaintiff for five hundred dollars damages, the defendant moved for a new trial, upon the ground that the jury should have been directed to limit the damages to the actual injury which the plaintiff had sustained, and instructed that they were not at liberty to give vindictive damages. The rule for a new trial was discharged, and the defendant appealed.

Caldwell, for the plaintiff.
Pearson, for the defendant.

DANIEL, J. The defendant moved for a new trial, because the Judge had charged the jury, that they might give vindictive damages, under all the circumstances, when in law he should have directed the jury that the damages should be restricted to the actual injury which the plaintiff had sus-

tained. The counsel for the defendant now contends, that the case contains no circumstances to show that vindictive damages should be given; that the rule for damages is a matter of law, and if the Judge mistakes it, it is a cause for a new trial. He says that the rule for damages in trespass on property, when it is destroyed, is the value of the property, and the inconvenience of the plaintiff by the destruction at the time.

In looking into the books, we find the rule in this action to be, that the jury are not restricted in their assessment of damages to the amount of the mere pecuniary loss sustained by the plaintiff, but may award damages in respect of the malicious conduct of the defendant, and the degree of insult with which the trespass was committed. The plaintiff is at liberty to give in evidence the circumstances which accompany and give character to the trespass. 2 Stark. Ev., 813. In *trespass quare clausum fregit,* the jury are not confined to the precise value of the subject-matter of damages, although they are not allowed to go out of the way to an unreasonable amount. *Cox v. Dugdale,* 12 Price, 708; *Merest v. Harvey,* 5 Taunt., 442; 1 E. C. L., 150. In trespass to the (442) person, the jury are permitted to punish insult by exemplary damages. (*Merest v. Harvey*). In *Woert v. Jenkins,* 14 John., 352, it was held that in an action of trespass for beating the plaintiff's horse to death, the jury might give damages beyond the value of the horse, or *smart money,* there being proof of great and wanton cruelty on the part of the defendant. In the case now before the Court, it is scarcely possible that the trespasses complained of could have been committed without wanton malice and insult. If, in truth, the circumstances attending them were such as to render the instruction of the Judge, which was *prima facie* correct, inapplicable, then the defendant who excepts to the instruction, should have had those circumstances so spread upon the record, as to enable us to see that error was committed. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Wylie v. Smitherman, 30 N. C., 239; *Gilreath v. Allen,* 32 N. C., 69; *Sowers v. Sowers,* 87 N. C., 307; *Waters v. Lumber Co.,* 115 N. C., 656; *Remington v. Kirby,* 120 N. C., 325.

DOE ex dem. DENNIS INGRAM v. CHRISTOPHER WATKINS et al.

1. To impeach the credibility of witness by proving that he swore differently as to a particular fact on a former trial, it is not necessary that the impeaching witness should be able to state all that the impeached witness then deposed. It is sufficient if he is able to prove the repugnancy as to the particular fact with regard to which it is alleged to exist.

2. The fact of a witness being interested in the matter in dispute must be shown only in the mode in which other controverted facts are to be proved. Therefore, the declarations of the witness not on oath, nor in the presence of the party against whom they are offered, with respect to his interest in the subject-matter of the suit, cannot be given in evidence.

3. The reception of improper testimony will not be a ground for a new trial, if the only effect of such testimony can be to remove or weaken improper testimony introduced on the other side. A judgment will not be reversed for inadvertencies or mistakes which *did not* and *could not* affect the rights of him who complains of them.

EJECTMENT, on the trial of which, at ANSON, on the last circuit, before his Honor, *Judge Norwood,* it became important to establish the boundary of the grant under which the plaintiff's lessor claimed. The defendant (443) had introduced the deposition of one Joseph Colson, who stated that his father, under whom the defendants set up title to the land in dispute, had claimed a certain house as being upon his land, but had never lived in it; and the plaintiff, to discredit this witness, proposed to show that on a former trial between the same parties he had sworn that his father claimed *and occupied* the house in question. The defendant's counsel objected to the testimony thus offered, unless the witness by whom it was proposed to be given could undertake to state in substance the whole of the evidence given in by the impeached witness on the former trial, which he admitted he was unable to do. The Court overruled the objection, and the witness was examined as to that point.

The plaintiff then introduced another witness, one John Hough, to prove the line claimed by him. For the purpose of assailing the credibility of this witness before the jury, the defendants produced several witnesses who testified to declarations of Hough that, if the plaintiff recovered, he was

to have half the land. To explain this, the plaintiff recalled Hough, who stated that his declarations had reference to another tract of land, which he had entered, and which the plaintiff had assisted him in surveying. And in order to strengthen this witness' testimony upon this point, the plaintiff called one Edwin Ingram to prove another and distinct conversation between Hough and the witness Ingram, in which Hough stated that he had discovered vacant land, and that he and the plaintiff, in consideration of the plaintiff's services, were to divide it equally between them. To this evidence of the declarations the defendant objected, but the Court received it, upon the ground that the plaintiff had a right to give the declarations of Hough as to what he had stated at a different time on the same subject, before the bringing of the suit. A verdict was returned for the plaintiff, and the defendant appealed.

Mendenhall, for the plaintiff.

(444) No counsel appeared for the defendant.

GASTON, J. The errors assigned in this case are both founded on the alleged reception of improper evidence. (His Honor here stated the facts upon which the first objection was founded, and proceeded): The Court overruled the objection, and we are of opinion, overruled it properly.

Upon the death of a witness who has been examined in a judicial proceeding, such examination is admissible as secondary evidence in a subsequent trial between the same parties. Here it is required that the secondary evidence shall be full, because it is offered as a substitute. The testimony of the deceased witness should be placed before the new, as the law required it to be placed before the former triers. Both are entitled not only to the truth, but to the whole truth. The copy must be ascertained to be faithful before it is admitted as a representative of the original. Besides, to receive an avowedly imperfect account of what had been formerly testified in lieu of the former testimony itself, would be to encourage the party to offer partial instead of full secondary evidence. He would be interested to seek out such witnesses as remembered only those portions of the former testimony as made in his favor. But in this case it

was the purpose of the plaintiff to bring the former testimony of the witness to the notice of the jury, not as evidence, not as a guide to truth, but as conflicting with the testimony given by him on the present trial, and thereby satisfy them that the witness was not a man of veracity, was undeserving of credit, and that his testimony should be disregarded. To impeach a witness' credit, one clear and advised contradiction in this respect is sufficient, since it is the rule of law, as of good sense, that he who falsifies himself in one point is undeserving of belief in all; *falsus in uno falsus in omnibus.* No more, therefore, of the witness' former declaration is necessary to be heard than what is charged to be repugnant to his present statement. In all other respects, where a repugnance is not shown, the presumption is that the respective statements were consistent. It is proper to require of the impeaching witness that he should know and state all that the impeached witness said in relation to the matter in which the repugnancy is alleged; but it seems to us that no more can be reasonably demanded. Even on (445) an indictment for perjury, it is not necessary for the prosecution to prove all the evidence given by the defendant on the trial wherein he testified; but it is sufficient to prove all the evidence given by the defendant in relation to the fact on which the perjury is assigned. *Rex v. Rowley,* Ry. & Moody, 299; 21 E. C. L., 444. It might be questioned in the case before us whether, giving entire faith to the impeaching testimony, it established the repugnancy which it was offered to show; but it was not so manifestly irrelevant for that purpose as to justify its rejection. It was, therefore, properly submitted to the jury.

As for the other exception which is relied on as a ground for reversing this judgment, although we have no difficulty in saying that a rejection of the testimony excepted to would not have been error, yet we are of opinion that its admission is not an error of which the defendant has a right to complain. The whole inquiry as to the declarations of the witness Hough, whether he had or had not an interest in the matter in dispute, seems to us to have been irregular. It was, indeed, competent for the defendant to show, with the view of impairing the weight of that witness' testimony, that he had an interest in the controversy; but this fact ought to

have been shown by competent evidence. The fact of interest might have been established by the witness's own oath—or by the testimony of other witnesses—or by the admission of the plaintiff; but it could be rightfully shown only in the mode in which other controverted facts between the litigant parties are allowed to be shown. The declarations of a third person, whether a witness, or not a witness, made not on oath, nor in the presence of the party against whom they are offered, cannot be brought forward by either plaintiff or defendant as *evidence of the truth* of the matters so declared. The first great safeguard which the law provides for the ascertainment of truth consists in requiring all evidence of facts to be given in under the sanction of an oath. We find no exception, when the fact to be shown is the interest of a witness in the subject of dispute. Now this improper
(446) inquiry was commenced by the defendant, and the irregularity complained of did not extend to nor affect any other inquiry. If the testimony to which he excepts had *any* weight with the jury, it could have operated only to remove or weaken the impression produced by the testimony which the defendant had given of the witness's declarations. But this impression itself was altogether improper. The plaintiff might have required of the Court to instruct the jury to disregard those declarations altogether—to strike them out of the evidence. No *injury* was done to the defendant by the reception of the testimony excepted to; and a judgment will not be reversed for inadvertencies or mistakes which *did not* and *could not* affect the rights of him who complains of them. It is the opinion of this Court that the judgment of the Superior Court should be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Edwards v. Sullivan, 30 N. C., 304; *S. v. Williams,* 47 N. C., 266; *Jones v. Ward,* 48 N. C., 25; *S. v. Lawhorn,* 88 N. C., 638; *S. v. Shields,* 90 N. C., 694; *S. v. Pierce,* 91 N. C., 611.

JOHN GIBBONS et uxor, et al., v. JAMES DUNN.

Where a testator bequeathed a female slave "to his wife, during her natural life, or widowhood," and in a subsequent clause of his will provided that the slave should become the property "of my daughters A and B, at their mother's death, *or* at the time that my son Thomas arrives at sixteen years of age; and her increase, if any, before that time, to be equally divided amongst the rest of my children; if the widowhood of my wife should terminate before her natural life, Nell shall remain in this place for the support of my children who may live here": It was *held*, that the increase born after the arrival of Thomas to the age of sixteen years, but before the death of the widow, would belong, after the death of the widow, to A and B; particularly as that construction would harmonize with the rest of the will, which seemed to aim at an equal distribution of the testator's property among all his children.

DETINUE, for a negro boy, by the name of Richard, tried at MECKLENBURG, on the last circuit, before his Honor, *Judge Strange*.

The plaintiffs claimed under the will of Andrew Dunn, deceased, the material parts of which were as follows: "I bequeath unto my son Andrew the tract of (447) land whereon he now lives, containing three hundred and twenty acres; also one-third part of all the pine land now belonging to me; also to my said son one horse named Buck, and one cow now in his possession; two ploughs and gears, and his plantation. I bequeath unto my beloved wife Mary a sufficient maintenance out of the produce of this plantation whereon I now live, during her widowhood or natural life; also a negro woman named Nell, and her child, Esther, during the same times; also all the household furniture now in my possession, except one corner-cupboard of walnut; these last mentioned articles to her use, during her life, then to return to my children, in such manner as he thinks proper to dispose of them. To my sons James and Thomas I bequeath this tract of land whereon I now live of three hundred and twenty-three acres, to be equally divided between them, share and share alike; also to my sons James and Thomas, to each one-third of my pine lands. I bequeath my new wagon, with all her gears, cloth, etc., to my three sons, Andrew, James, and Thomas. I desire that two of my best horses that may be in my possession at my decease shall

be kept on this plantation for the support and use of those of my family who live on the plantation; also two ploughs; and all the necessary plantation tools in my possession, to remain on this place for the same use as before mentioned. I bequeath to my daughter Jane, wife of John Gibbons, one bay mare named Diamond, and her colt; also two cows, and all the household furniture now in her possession. I bequeath to my daughter Elizabeth, wife of Thomas Spratt, a bay mare named Fearnought, two cows, and one of them yet in my possession; also the household furniture she got from me. I bequeath to Martha one black mare named Dandy, her saddle, a featherbed and furniture, and two cows. I bequeath to my daughter Mary a two-year-old bay filly named Fearnought, a saddle, featherbed and furniture; also two cows. I bequeath the negro child Esther, before-mentioned, with her increase, if any, to my daughters Martha and Mary equally, share and share alike, at their mother's death. I desire that
(448) the negro woman Nell, before mentioned, shall become the property of Jane Gibbons and Betsy Spratt, before mentioned, at their mother's death, or at the time that my son Thomas arrives to sixteen years of age; and her increase, if any, before that time, to be equally divided among the rest of my children: and be it understood, that it is my will that if the widowhood of my wife should terminate before her natural life, the above-named negro shall remain on the place for the support of my children who may live here."

At the execution of the will the negro woman was about twenty years of age, and had previously borne two children, one of whom had died, and the other (Esther) was then three or four years old. Thomas, the son of the testator, was, at the time of making the will, about seven years old; and arrived at the age of sixteen on 10 January, 1812. The boy Richard was born of Nell, in May, 1813; and Mrs. Dunn, the widow of the testator, died in the year 1834, before the bringing of this suit. The jury returned a verdict for the plaintiffs, subject to the opinion of the Court upon the above case. His Honor expressing himself bound by the construction put upon this will by the Supreme Court, in *Gibbons v. Dunn*, 7 N. C., 548, set aside the verdict and directed a nonsuit; from which the plaintiffs appealed.

D. F. Caldwell, for the plaintiffs.
Badger, contra.

DANIEL, J. The case referred to by the Judge who tried the cause in the Superior Court (*Gibbons v. Dunn,* 7 N. C., 548) only decided the right under the will, of the widow of the testator in the slave Nell. It did not intimate any opinion as to the extent of the respective rights of the children of the testator to the issue or *increase* of Nell. That question now comes before us for decision. The testator had given Nell to his wife during her life or widowhood. The particular clause in the will out of which the dispute arises is as follows: "I desire the negro woman Nell shall become the property of Jane Gibbons and Betsy Spratt (who were two of the testator's daughters) at their mother's *death,* or at the *time* my son Thomas arrives to *sixteen years* (449) *old;* and her increase, if any, before *that time,* to be equally divided among the rest of my children." The testator left five other children, three sons and two daughters, in whose behalf the defendant resists the plaintiff's recovery.

The slave *Richard,* the son of Nell (for the recovery of whom this action is brought), was born after the testator's son Thomas Dunn, had arrived to the age of sixteen years. The widow of the testator being dead, the plaintiffs contend that the boy Richard, in law, comes to them with Nell, the mother. They say, he is not one of the increase of Nell which was intended by the *will* to go to the other children of the testator. The defendant contends, that all the *increase of Nell* belonged to the rest of the children, which should be born at any time before the *two* events occurred, viz., the arrival of Thomas at the age of sixteen years, *and* the death of the testator's widow. There are two periods of time marked in the clause or sentence: *First,* the death of the mother; and *secondly,* the arrival of Thomas to the age of sixteen years. That portion of the increase of Nell, which, by the will, was intended to go to the *rest* of the children, is to be limited, as we conceive, to the time that Thomas Dunn, the son of the testator, arrived at the age of sixteen years. The relative *"that time,"* in the sentence, refers to the *next* antecedent, according to grammatical construction; which antecedent would be the *time* that Thomas arrived at six-

teen years. But the intention of the testator, if clear and consistent with the rules of law, is to govern, without regard to the grammatical construction, or whether it deserves favor or not. *Thellusson v. Woodford,* 4 Ves., 311; 11 Ves., 112. Did the testator intend that more of the issue or increase of the slave Nell should go to the *"rest of the children,"* then by a grammatical construction the clause or sentence would authorize? To ascertain the intention, the state of the testator's family at the time of making the will may be attended to. *Odell v. Crone,* 1 Ball & B., 449; 3 Dow., 68. The whole will may be examined, and the state of the property looked at, if it appears on the face of the will: not *de hors,* (450) unless to explain a *latent ambiguity. Page v. Leapenwell,* 18 Ves., 466; *Kellet v. Kellet,* 1 Ball & B., 533; 3 Dow. P. C., 248. Following these rules to ascertain the intent, although it appears that the two daughters (plaintiffs) were married, and would of course be provided for by their husbands, yet it is not to be supposed that the testator intended to give to those two the slave Nell only, without any of her increase which might be born before both events mentioned in the clause had happened. The time when one of the events was to happen (the arrival of Thomas to sixteen years) was certain and fixed; but the other, the death of the mother, was uncertain, and might be prolonged to such a period, that Nell would be too old to breed, and might be an expense instead of a benefit. Nell was twenty years old at the making of the will; she then had two children, one alive (Esther) the other dead. Thomas, the son of the testator, was, at the making of the will, only seven years old. Nell, probably, would have five children before Thomas attained sixteen years, when she would be twenty-nine years old, which would give one slave to each of the "rest of his children." It seems to us, that the testator intended a benefit and a generous bounty to all his children; for each of whom there is nothing to show us, that he did not have an equal parental regard. To his three sons, by his will, he left his lands (viz.): To Andrew three hundred and twenty acres and one-third of his pine lands, a horse, cow, and plantation utensils. To James and Thomas, he gave the tract of land he had lived on (three hundred and twenty acres), also each one-third of his pine lands. His new wagon, he gave to his three sons.

He directed his plantation to be kept up, and his younger children to be raised on it; and after the death of his widow, he gave the slave Esther and her *increase* to his other two daughters, Martha and Mary. He also gave to each of them a horse and saddle, two cows, a feather bed and furniture. All the property which he had at any time before given to Jane and Elizabeth (the plaintiffs), as he states in his will, was to Jane, a mare and colt, two cows and calves, and some household furniture. To Elizabeth, he had given a mare, two cows, and some household furniture. To what property he had given his five other children, by other (451) clauses in his will, he, by the clause now in question, meant to give them an additional portion in the anticipated increase, to a given period, of the slave Nell. If we confine that period to the arrival of Thomas to the age of sixteen years, something like a rational distribution of his property among all will appear to have been intended. It appears to us, that it was for the benefit of the younger children the testator directs Nell to remain on the plantation until Thomas should be sixteen, although the widow might die or marry before that time. That period limits the interest of the children as against the general remainder given to the plaintiffs. But there was also the benefit intended for the testator's wife, which was a provision during her life or widowhood. That induced him to give Nell and her issue to the wife beyond Thomas's coming of age, and is the sole motive for keeping Nell and issue from the plaintiffs; and, therefore, no construction is admissible, but such an one as may be necessary to give effect to that intention. That cannot reach the disposition of the issue, after the determination of the widow's estate; she is no way concerned in that question. Nor can we suppose the testator intended to make the interests of his respective children, as against each other, dependent upon the length of their mother's life. It is more rational, that he should give to the plaintiffs all the issue, except that which should be born before they could get Nell, in any possible event, and to the other children, all such issue thus born before that event. From every legal and fair rule of examining this case, it seems to us, that the grammatical construction of the clause, is not at variance with the real intention of the testator; and, as the slave Richard was born of Nell,

after the testator's son Thomas arrived to the age of sixteen years, he went to those, who, in law, were entitled to the mother; and, as the widow of the testator died before the bringing of this action, the plaintiffs are entitled to recover. The judgment of nonsuit must be reversed, and a judgment rendered for the plaintiffs, pursuant to the verdict.

PER CURIAM. Judgment reversed.

Cited: Watkins v. Flora, 30 N. C., 378.

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ARTHUR JONES v. LEWIS SASSER.

1. A person who has title to a slave will not be estopped, by reason of any concealment or misrepresentation of that title, from setting it up against one who claims as a volunteer.

2. The title to slaves cannot be transferred without consideration by virtue of an estoppel arising from the misrepresentations of the owner, as that would be in contravention of the Act of 1806 (Rev., ch. 701), which requires gifts of slaves to be in writing; and an estoppel cannot be set up to defeat the statute.

3. Where a son, to whom the father had conveyed a slave by deed of gift, but retained the possession by permission of the son, was alleged to have stood by, while his father was making another voluntary disposition of his property, by deed, among all his children, and to have fraudulently concealed or mirepresented his title, it was *held*, that a private conversation, which occurred between the son and father, just before the execution of the latter deed, in which the father assured the son that, by becoming a party to it, his right under the deed of gift would not be prejudiced, was admissible to show that the son himself was misled; and that it was, also, to prove how the father held the slave.

4. Where a specific consideration is set forth in a conveyance, and no others are referred to in general terms, none other than the specific one can be averred and proved. But if one consideration is specified, and others are referred to in general terms, it is competent to show them forth in evidence; and where the deed is wholly silent as to the consideration, proof of the actual consideration is admissible.

5. A mere trustee, who has no direct interest in the event of the suit, is competent to testify in that suit.

6. The doctrine of legal and equitable estoppels partially discussed by GASTON, J.

DETINUE, for a negro slave named Sheppard, tried at LENOIR, on the last circuit, before his Honor, *Judge Saunders*.

The plaintiff claimed under a deed from his father, Arthur Jones, Sr., dated 5 April, 1827. This deed purported to have been made for the consideration of natural love and affection, and also for the better maintenance and preferment of the plaintiff, and conveyed, besides the slave Sheppard, several other negroes, and land. It was admitted by the defendant, that the deed was perfectly fair and *bona fide*, and conveyed the slave in question to the plaintiff. But the defendant contended that the title of the plaintiff was transferred and extin-

guished, or that he was estopped to assert it, by certain deeds, which were executed subsequently thereto, to-wit, on
(453) 11 and 15 August, 1829, and by the conduct of the plaintiff, in relation to the execution of those deeds. The first of these deeds was executed by the father, Arthur Jones, Sr., his son, Arthur Jones, the plaintiff, and by the husbands of all his other children, who were daughters. It purported to be a *division* by the father, of his "*estate*" among his five children; and the several allotments were expressed to have been made by Sampson Lane, Micajah Cox, William Raiford, John Kennedy and John Wright, into equal shares. Among the negroes named in the different lots, were some of those included in the deed to the plaintiff, but the boy Sheppard was not mentioned in any of them. Certain conditions were annexed to the division, which were expressed to be as follows: That his children should pay him annually what the commissioners who divided his property, should think sufficient to support him; and the property, which he had reserved for his own use during his life, and pay a note that he owed to one Saunders Smith; that they should keep up all his fences; pay the taxes on the negroes they should have in possession, and equally the taxes on all his lands. It was then provided, that the foregoing disposition of his property should continue in full force from year to year, or until a majority of the said commissioners should find it advisable "to alter or do away said agreement"; and the donor continued: "I further wish the above-named committee to divide my property, both *real* and *personal,* if I should not live to see the expiration of the said loan, which is to stand in full force until 1 January, 1831, and as much longer as said committee, or a majority, think it advisable, as above stated; all power resting, and forever to rest, in a majority of said committee." The second deed purported to be an indenture between Arthur Jones, Sr., and Sampson Lane, William Raiford, Micajah Cox, John Kennedy, and John Wright, as trustees for all the children of the said Arthur, and was executed by the father and all the trustees. It recited, that the said Arthur Jones, Sr., being incapable from his age and infirmities, of attending to his estate and affairs as formerly, had agreed, for the advancement of his children,
(454) to make over his property to the above-named trustees,

so that they should pay his debts and afford him a maintenance; and in order to carry the said agreement into effect, and in consideration of the natural love and affection which he bore his children, and in further consideration of the "provisos, covenants and agreements, hereinafter mentioned, by the said trustees of his said children, to be observed and performed," he gave, granted and assigned unto the said trustees, "all the property" which he then possessed, both real and personal. The trustees then covenanted for the payment of the debts and maintenance of the old man, during his life. The title of the property was to remain in the trustees during the life of the grantor, and they were authorized, during his life, to make loans of equal parts of his estate to each of his children, and at his death to make an equal division of all his property, both real and personal, to his children, as before mentioned. To the whole was annexed a proviso, that if the trustees should fail to pay his debts, or afford him a proper maintenance, the grantor should "take, repossess and enjoy all the premises thereby granted, as in his former estate."

The defendant then proved by some of the trustees, who were objected to, but received by the Court, that after the execution of the deed of the 11th, to which the plaintiff was a party, and of the contents of which he was apprised, it was agreed between Arthur Jones, Sr., and the trustees that a more perfect instrument than that deed should be prepared and executed, so as to vest the title to all the estate of Arthur, the elder, in the trustees, and that they were all to meet on the 15th of the same month to have it executed and to finish the division of the property which remained undivided on the 11th. It was further proved that the plaintiff had notice of this agreement; that he met the other parties on the day appointed, and was present when the instrument of that date was executed, and, upon hearing it read, approved of it. The defendant also proved by the trustees that the slave, Sheppard, always remained in the possession of old Arthur Jones (who claimed him as his own) during his life, and that when the slaves were about to be divided and conveyed to the trustees the plaintiff assisted in (455) naming them, and, among others, mentioned Sheppard, and that this was in the presence of his father and the

trustees; that Arthur Jones, the elder, previous to the execution of the deed of 11 August, and in the presence of the plaintiff, directed all his estate, real and personal, including Sheppard, to be conveyed to trustees, and that it was to be settled in them for the use and benefit of his children during his life, and at his death to be equally and absolutely divided among all his said children, reserving to himself the use of Sheppard and four others to wait upon him, and at his death to be divided with the rest of his estate as above mentioned, and that he was to be maintained and supported and to have his debts paid. It was proved, further, that Arthur Jones, the elder, died in April, 1830, and that the trustees, under the said deeds, hired out the slaves, including Sheppard, until 1 January, 1831, when they divided all the property of the old man among all his children, and that Sheppard, in the division, was allotted and delivered to the defendant, who was one of the *cestui que trusts* under the deeds of 11 and 15 August, and that the plaintiff afterwards, but before the commencement of this suit, demanded the said slave of the defendant, who refused to deliver him up.

The plaintiff offered to prove that besides the consideration set forth in the deed of gift of 5 April, 1827, there was a valuable consideration, but the testimony was objected to by the defendant and rejected by the Court. The plaintiff then, in explanation of his conduct, as shown on the other side, proved that when the deed of 5 April was executed by his father there was a parol agreement that the donor should retain the use of the property conveyed during his life, and that the subscribing witnesses to the deed of gift were requested by the donor to keep it a secret. It was also proved by the plaintiff that he had lived with his father until within two or three years of his death, as a manager or overseer of his slaves and other property. The plaintiff then offered to prove that on the day when the deed of 11
(456) August was executed, but before its execution, a conversation occurred between him and his father, not in the presence or hearing of the trustees or the other children, but apart to themselves, wherein his father assured him that by becoming a party to the said deed of the 11th his right under the deed of April, 1827, would not be prejudiced. This testimony was objected to, and rejected. His

Honor charged the jury that as the deed of 5 April, 1827, was admitted to be valid, and operated to convey the slave in question to the plaintiff, they would direct their attention to the subsequent deeds of 11 and 15 August, 1829; that if those deeds were fairly obtained and freely executed, and the conduct of the plaintiff was such as the testimony seemed to represent, and thereby the parties to these instruments and arrangements were deceived and imposed upon, the jury should find for the defendant. A verdict being returned accordingly, a new trial having been moved for and refused, and a judgment rendered for the defendant, the plaintiff appealed.

Mordecai and *J. H. Bryan,* for the plaintiff.
Badger and *W. C. Stanly,* for the defendant.

GASTON, J., after briefly stating the case, pro- (462) ceeded: Our duty is to ascertain and pronounce whether the instruction complained of be in law erroneous. If it be, the judgment must be reversed. In discharging this duty we must not permit our understandings to be in the least swayed by the equity or hardship of the case. Whatever these may be must be left to the decision of the tribunal to which the country has given jurisdiction of such matters. The security of all requires that in a court of law whatever the law prescribes should be sacredly observed.

To uphold the construction complained of, it must be shown that by force of one or the other or both of these deeds, or by the legal effect of the conduct of the plaintiff, or by the combined operation of these instruments and this conduct the plaintiff has *lost* his property in the slave sued (463) for, which cannot be, unless he has thereby transferred it to some other. The construction, therefore, necessarily holds that the plaintiff has transferred his slave. We feel ourselves obliged to declare that in this respect it is erroneous.

The negro in dispute is not conveyed nor attempted to be conveyed in either of the deeds by name. If comprehended within them, it must be because he is included within the general words used by Arthur Jones, the elder, "my estate," or "my property," or "all the property I possess." We hold

it clear that these general words do not pass or purport to pass anything which was not held by the grantor as his own property. We cannot understand them as applying to the property of others in the occupancy of the grantor. It is indispensable, therefore, before any operation upon this slave can be ascribed to these instruments, that it shall appear that the slave was then held by the grantor as *his property*, and was not held as the property and by permission of the plaintiff. The law always presumes that every possession is consistent with right. If the negro was then the property of the plaintiff, retained by his father under agreement with the plaintiff, it was held as the property of the plaintiff. If there was evidence tending to establish the fact that although the slave was then, in truth and to the knowledge of the father, the property of the plaintiff, he was nevertheless held adversely to the plaintiff and as his own property (on which point we forbear to venture an opinion), still the *Court* could not assume such to be the fact, and upon the faith of that fact declare the slave included within this general description.

It is strenuously urged, however, that the plaintiff was concluded and estopped by his deceitful concealment and misrepresentation of the ownership of the property conveyed by his deed from setting up any claim under that deed, to the injury of those whom he thus deceived and imposed upon. It is conceded that this exclusion or bar is not strictly a legal estoppel, for usually no man is estopped by any oral admission, or even any written admission not of (464) record or under seal. But it is insisted that upon the principles of good faith a man ought not to be allowed to repudiate his own representations made to influence the conduct of others, whereby *he* has derived any advantage or *they* have been induced either to part with their property or to forego a benefit or incur an onerous responsibility. And it is contended that upon this principle has been established a species of equitable estoppel which renders such representations, when thus acted upon, conclusive evidence of the truth of the facts so represented. Distrusting my ability to free this doctrine of *quasi* estoppels from the perplexities which involve it, I shall not undertake to define its extent. I shall content myself with saying that so far as equitable estoppels have been definitely recognized as *rules of law*, this

Court will unhesitatingly and cheerfully so respect them. But it cannot but apprehend that they have sometimes been incautiously admitted in courts of law from a solicitude to advance the justice of a particular case, although from the nature of their jurisdiction and the inflexible forms of proceeding, these courts were not competent to the exact administration of equity. Thus it has happened that legal certainty has been prejudiced, without the compensating advantage of effecting complete justice. All estoppels, whether estoppels at common law or these equitable estoppels, are *founded* upon the great principles of morality and public policy. Their purpose is to prevent that which deals in duplicity and inconsistency, and to establish some evidence as so conclusive a test of truth that it shall not be gainsaid. But, as the effect of an estoppel may be to shut out the *real* truth by its artificial *representative*, estoppels, whether legal or equitable, are not to be extended by construction. In legal phrase, they are not *favored*. No man is to be precluded from showing the truth of his claim or defense, unless it be forbidden by a positive rule of law. And especially should that rule be unequivocal which sets up unsolemn acts or declarations, supposed to be ascertained through uncertain, defective, erring or fallacious testimony, as an absolute bar to all further investigation. It is in general more safe, instead of annexing an arbitrary effect to such acts (465) and declarations, to leave them to the jury as evidence of whatever inferences of fact can thence be fairly deduced. Fraud, indeed, will not thus be always defeated; but he who is thereby injured can obtain remuneration in damages for the wrong sustained from a court of law; and he who is threatened with injury will find protection against the wrong meditated from a court of equity which, in the exercise of its appropriate jurisdiction, converts the fraudulent agent into a trustee.

We believe there is no rule of law which shuts out the plaintiff in this case from insisting on the truth of his claim, notwithstanding his former misrepresentations. The defendant who may thus be disappointed has not been deprived by these misrepresentations of what was before his; and the plaintiff, through the means of these misrepresentations, is not shown to have gained anything. The plaintiff stands

upon his deed. The defendant has no claim upon the property as a purchaser. It is argued here, and so it was held below, that the instrument of 15 August was executed for a valuable consideration. If it were so, we do not see how the estoppel would be helped thereby until it is first shown that the thing in dispute is contained in that deed. The covenants of the trustees in that instrument are said to constitute a consideration of value; they are the consideration, however, only for the things thereby conveyed. But the consideration of value required to bring a case within the range of an equitable estoppel is not such a consideration as might be sufficient to raise an use or to give technical operation to a deed of bargain and sale. But one which makes him from whom it moves a purchaser in effect shows that he has substantially bought what is transferred. It is not alleged that these trustees have paid or are liable to pay anything out of their own pockets because of this transaction, that they have advanced anything as the price of the conveyance, or that they will sustain any loss in case the conveyance should be partially defeated. But, besides these objections, to hold that the plaintiff has, by his representations or misrepresentations, express or tacit, transferred the slave in ques-

(466) tion, would be to violate the positive law of the State. There is no consideration moving to him for the pretended transfer; as to him, then, it is a *gift*. The Act of 1806, declaring what gifts of slaves shall be valid, peremptorily declares that no gift thereafter to be made of any slave shall be good or available, either at law or in equity, unless the same shall be made in writing, signed by the donor, attested by at least one credible witness, and registered as conveyances of land. The law cannot permit that an estoppel should be set up to defeat the law. *Mylton v. Gilbert*, 2 Term, 169.

We think there was also error in rejecting the testimony offered, that on the day of the execution, and before the execution of the instrument of 11 August, a conversation occurred between the plaintiff and his father, in which the latter assured him that by becoming a party thereto his right under the deed of gift would not be prejudiced. If it is sought to divest the plaintiff of his property by reason of his deceitful conduct, he ought to be permitted to show any cir-

cumstances attending the transaction which may tend to prove that he was himself misled. Such evidence, too, *if believed,* shows the character in which the father held the property embraced in that deed.

We hold that there was no error in rejecting the testimony offered by the plaintiff to show a different consideration for his deed of gift than that therein mentioned, nor in admitting the trustees to testify as witnesses for the defendant. The general rule with respect to averring and showing a consideration we understand to be, that where a specific consideration is named in the conveyance, and none others referred to in general terms, *that* must be regarded as the sole consideration, and negatives any other; that where a consideration is specified and others referred to in general terms, it is competent to show these forth by evidence; and that when a deed is wholly silent as to the consideration, proof of the actual consideration is admissible. We see no reason for not applying the general rule to this case. We hold the witnesses competent, because it does not appear that they, or any of them, had a direct interest in the event (467) of the suit.

The judgment is reversed, and a new trial must be awarded below.

PER CURIAM. Judgment reversed.

Cited: Moore v. Gwyn, 26 N. C., 281; *Chesson v. Pettijohn,* 28 N. C., 123; *West v. Tilghman,* 31 N. C., 165; *Credle v. Carawan,* 64 N. C., 425; *Stith v. McKee,* 87 N. C., 391.

RICHARD BENNETT v. GEORGE FLOWERS.

Where one made a parol gift of slaves to his son-in-law, and the latter, by direction of the former, gave them, by his will, to the grandchildren of the donor: It was *held*, that this did not constitute a gift in writing, within the Act of 1806 (Rev., ch. 701), and that the donor might, after the death of his son-in-law, resume the possession of them.

DETINUE, for several slaves, tried at IREDELL, on the last circuit, before his Honor, *Judge Strange*.

It appeared that the slaves in question had been delivered by the plaintiff to Charles Shelton, the defendant's testator, upon his intermarriage with the plaintiff's daughter, about the year 1811 or 1812, and that they had remained in the possession of Shelton and the defendant, his executor, ever since. There was no deed of gift for the slaves produced, but it was proved on the part of the defendant that a short time previous to the death of his testator the plaintiff sent him directions to bequeath the slaves to the children which the testator had by the plaintiff's daughter, so that they might not go to other children which the testator had by a second wife. The defendant then produced the will of Shelton, in which all the said negroes, except two, were bequeathed to the children which Shelton had by the plaintiff's daughter and in which the defendant was appointed executor. Upon this evidence, under the instructions of his Honor, a verdict was returned in favor of the plaintiff for the two negroes not bequeathed in the will, as above mentioned, and in favor of the defendant as to the residue; whereupon the plaintiff appealed.

(468) *D. F. Caldwell*, for the plaintiff, relied upon the Act of 1806 (Rev., ch. 701), "declaring what gifts of slaves shall be valid"; and contended that the plaintiff was not estopped by the direction sent to the defendant's testator, because estoppels apply to matters of fact, but never to those of law. He also contended that if the directions were to be considered as a delegation of power to the testator, they conferred a special power which had not been pursued, and that therefore the plaintiff's interest in the slaves had not been transferred and his title to them not affected.

Pearson, for the defendant, contended that the charge of the Judge might be supported upon the grounds, first, of authority; second, of fraud. 1. The directions to the testator authorized him to transfer the slaves by his will. The Act of 1806 only requires a writing where parol was necessary before. A person may authorize another to sign a writing for him, and this authority may be by parol. See the construction put upon the Statute of Frauds, 29 Charles II.; *Coles v. Trecothick,* 9 Ves. Jun., 234; *Timon v.* ————, 1 Sch. & Lef., 22. The will does not, indeed, convey two of the slaves, but the power is good as far as it goes. 2. If the owner of property stands by and permits another person to sell, he is precluded from claiming, as it would be a fraud for him to do so. *Bird v. Benton,* 13 N. C., 180; *Gibbotson v. Rowe,* 2 Vern., 554. If a father is permitted to make a provision for some of his children out of the property of a person standing by and not objecting, and to provide for his other children out of other property, it would be as great a fraud for the person afterwards to set up a claim and disappoint a part of the children as it would be in the case of a sale.

RUFFIN, C. J. We think the plaintiff has a right to all the slaves, as well as to those two for which he got a verdict. Shelton held under a bailment up to his death. The message sent to him, and his will, do not constitute a gift under the Act of 1806 (Rev., ch. 701). That requires a writing, signed by the donor and attested by at least one witness, proven or acknowledged as conveyances of land, (469) and registered in the office of the public register within one year. In no one of these several particulars does this case come up to the statute. It is argued that the writing need not literally be signed by the donor's own hand, but it may be by another, under his authority; and, as the deed is not necessary to a gift, that the authority may be by parol, as under the Act of 1819 (Rev., ch. 1016). It need not be questioned that a gift may be made through the instrumentality of an attorney, though such a case is so little likely to occur as to render it highly improbable that it was in the contemplation of the Legislature. But we deem it clear that the attorney cannot be constituted by *viva voce* declaration

merely. There must be an act, in writing, from the donor himself. The statute is positive and precise in its language. The English statute of frauds and our Act of 1819 both have the words "or by some person by him thereunto lawfully authorized," and it is by force of those words, it has been held, that the authority need not be in writing, if at common law an authority to do the same act would be sufficient when delegated by word only. Those statutes require the contract to be in writing, but at the same time affirm one made by an agent and signed by the agent, without requiring the agency to be established by writing. The sole object was to put the terms of the contract beyond dispute. The Act of 1806 has no such clause, but requires a writing "signed by the donor" himself. The object is to protect the donor and his creditors from fraud or perjury as to the question whether the act is his, as well as in respect of the particular terms of the gift. His signature, either to the instrument, importing in itself to be a gift, or to one under which the immediate gift is made, is therefore indispensable. This is a broad principle, upon which the case is for the plaintiff. But if the authority to Shelton was valid it has not been properly executed. An authority to give must be to give in the name of the donor, and the donee is in under the donor and not under the agent. A gift or a legacy from the agent is entirely a different thing in form and substance. It must be taken subject to the legal title and assent of the executor, and to the claims of (470) creditors, whereby the gift itself might be defeated.

But it was argued by the counsel for the defendant that the express consent of the plaintiff to this disposition made it a fraud in him to defeat it, as in the case of an owner standing by at the sale of his estate and wilfully concealing his title. On whom is it a fraud? It can only be on those to whom it occasions a loss. Neither the testator nor his executor, the defendant, is in that situation. Neither of them parted with anything for these slaves nor has been prevented from receiving all that would otherwise come to him had the plaintiff resumed the possession of the slaves in the lifetime of Shelton. In a legal sense, therefore, there has been no fraud on the defendant, either in his individual or representative capacity—none that does not exist in every case of

a parol gift subsequently retracted. *Row v. Potts,* 2 Vern., 239.

It is said, however, that the testator might have made a different division of his own property amongst his two sets of children had he not considered the provision made at the instance of the plaintiff for some of them in these slaves valid. The case is silent as to his other property and as to his intentions with respect to it, and we cannot decide upon a supposed and possible state of facts. But if the supposition were true, it could not affect the legal right as between these parties. The utmost that could follow would be to give the beneficial donees of the testator the right to call on the plaintiff not to disappoint this provision, or to make good another which their father intended to make for them, and would have made but for his interference, as in the case cited at the bar, of the heir at law who prevented a testator from inserting a legacy into his will by promising to pay it without any alteration of the will. Whether that principle has any application to a case of this sort it is unnecessary to determine; for if it has, the record states no facts to raise the question, and if it did it is not a question which concerns the title in this Court. The donee cannot claim the legal property in the thing given, but only compensation out of it for that which would have been given. The judgment must (471) be reversed and a new trial granted.

PER CURIAM. Judgment reversed.

STEPHEN SKINNER v. BENJAMIN WHITE.

To charge a man with harboring a runaway slave is not actionable, without proof of special damage; although for such offense he might, if guilty, be indicted, and upon conviction be fined and imprisoned. The charge, to sustain an action, must impute an offense, to which is annexed an *infamous punishment*, a punishment which involves social degredation, by occasioning the loss of the *libera lex*.

ACTION of SLANDER, in which the declaration stated that the defendant said of the plaintiff "that he harbored a runaway negro belonging to Jonathan Reddick, and he could prove it; and he should be prosecuted for it." Upon the trial at CHOWAN, on the last circuit, before his Honor, *Judge Dick*, the jury found the defendant guilty of having spoken the words charged in the declaration, and assessed the plaintiff's damages to three hundred and twenty-five dollars, but subject to the opinion of the Court upon the question reserved, whether the words were in themselves actionable. Upon argument, his Honor, being of opinion that the words were not of themselves actionable, directed a judgment of nonsuit to be entered, from which the plaintiff appealed.

Badger, for the plaintiff, contended that charging a man with harboring a runaway negro was actionable. It imputes an act of moral turpitude which subjects a man to indictment and punishment, and degrades him in the eyes of the community. It is certainly actionable, unless it is the law that the offense imputed must be such that the punishment of it must be hanging, putting in the pillory, or whipping.

Kinney, for the defendant: The words charged do not necessarily impute the offense of harboring a runaway *slave*. The charge is of harboring a runaway negro belonging, etc., by which might have been meant that the negro was
(472) only an apprentice. It should have been alleged that the defendant meant thereby the harboring a runaway slave.

But if the words do impute the offense of harboring a runaway slave, they are still not actionable. They must impute legal infamy; the mere liability to punishment is not suffi-

cient. *Brady v. Wilson,* 11 N. C., 93. Liability to the punishment of imprisonment is not of itself sufficient.

Badger, in reply: The case in Hawks has no reference to the present. There the charge itself was not actionable, because there was no averment of the guilt of the offense, like charging one with killing a man simply. But if the words themselves import a criminal offense, the defendant must show that they were not so used. Negro belonging to a man must mean a slave—it is synonymous with slave. The criterion contended for by the defendant's counsel is not the true one. If the punishment of whipping was taken away from stealing, still it would be actionable to charge a man with stealing. It must, therefore, be the nature of the offense, and not the punishment, which renders the words actionable. Harboring a slave partakes of the nature of larceny. In the Act of 1816 (Rev., ch. 918) relative to the punishment of manslaughter, the Court recognized a distinction between crimes infamous or otherwise, and referred the infamous punishment therein directed to the offenses of an infamous nature. *State v. Kearney,* 9 N. C., 53.

DANIEL, J. An act of Assembly passed in the year 1821 (Taylor's Rev., ch. 1120), declares, that if any person shall harbor or maintain any runaway slave, such person shall be subject to indictment for such offense, and being convicted, shall be fined not exceeding one hundred dollars, and be imprisoned not exceeding six months. The declaration states, that the defendant said of the plaintiff, that "he harbored a runaway negro belonging to Jonathan Reddick, and he could prove it; and he should be prosecuted for it." The question is whether the words spoken are slanderous, and in themselves actionable? From the contradictory decisions in England, it is not easy to say what is now the rule to de- (473) termine what words are actionable of themselves, and what not. In *Ogden v. Turner,* Salk., 696, *My Lord Holt* said, to render words actionable, it is not sufficient that the party may be fined and imprisoned for the offense, if true; for, says he, there must not only be imprisonment, but an *infamous punishment.* This decision, which seemed to establish a fixed rule, was shaken, and materially contradicted, by what

fell from *De Grey, C. J.*, in giving judgment in the case of *Onslow v. Horne*, 3 Wils., 177. Starkie Slander, p. 41, says, that from all the British authorities, perhaps, it may be inferred generally, that, to impute any crime or misdemeanor for which corporal punishment may be inflicted in a temporal court, is actionable, without proof of special damage. Any objection to the extent of the above rule, he says, is in a great measure obviated by the statute, which enacts that when the damage does not amount to forty shillings, the costs shall be limited to the amount of the damages. In Chitty's General Prac., 44, the same rule appears to be laid down. He, in classing slanderous words, says, "nor can any action be supported, unless the words either, first, impute the guilt of some temporal offense, for which the party slandered, if guilty, might be indicted and punished in the temporal courts, and which words are technically said to endanger a man in law"; he then proceeds to give the other classes of slander, which are not applicable to this case. The rule, as to the extent of words actionable in themselves, has never been carried in this country as far as the above respectable commonplace authors state it to be in England. In several of the States, it seems to be, that where the charge, if true, will subject the party to an indictment *involving moral turpitude, or subject him to an infamous punishment,* then the words are actionable in themselves, otherwise not. *Brooker v. Coffin,* 5 John., 188; *Widrig v. Oyer,* 13 John., 124; 2 Bibb, 473; *Shaffer v. Kintzer,* 1 Binn., 542; *Ross v. McClurg, Ib.,* 218; *Chapman v. Gillett,* 2 Conn., 51. In *Andreas v. Hoppenheaffer,* 3 Serg. & Rawle, 255, the
(474) Judges concurred in opinion, that it must be either a *felony* or a misdemeanor affecting *reputation,* and, therefore, to charge a man with having committed an assault and battery, a nuisance, or the offense of forcible entry and detainer, though the party would be subject to indictment and imprisonment, would not be actionable. See also, 19 John., 367. In *Shipp v. McCraw,* 7 N. C., 466, it was held that the *gravamen* in an action of slander is the social degradation arising from the imputation of an infamous offense, and the infamy of the offense is tested by that of the punishment which follows on conviction—the loss of the *libera lex:* no other degradation will give an action, for no other degra-

dation is a social loss. In *Brady v. Wilson,* 11 N. C., 94, the Court said: "Inasmuch as the words did not impute to the plaintiff any felony or other crime, the temporal penalty of which would be legally infamous, the action could not be supported." In the other States, when the courts say the words are actionable if they subject the party to indictment and infamous punishment, provided they be true, we clearly understand what is the extent of the rule; but when they go on further to say, "or subject the party to an indictment involving *moral turpitude,*" we are left in doubt what charges are embraced within the sentence—it lacks precision; we are compelled to search moral and ethical authors, rather than legal writers, in order to ascertain whether the case made be within the rule. It seems to us that the rule laid down by *My Lord Holt,* that the words, if true, must not only subject the party to *imprisonment, but an infamous punishment,* is the settled rule of law in this State. The rule being thus precisely defined, gentlemen of the profession can never be at a loss how to advise their clients, nor can a Judge be at a loss how to charge the jury. In this case, the charge made by the defendant imported an offense punishable with fine and imprisonment; but the judgment would not render the person guilty of such an offense, infamous. He still would retain his *liberam legem,* and belong to the *boni et legales homines* of society, which appears to be the *teste* by which to ascertain whether words of this class be (475) actionable or not. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: S. v. Patton, 27 N. C., 179; *Stokes v. Avery,* 53 N. C., 68; *Sparrow v. Maynard, Id.,* 196; *McKee v. Wilson,* 87 N. C., 303.

The JUSTICES OF HYDE COUNTY to the use of FOYE et ux. v. ASA BELL.

Where the sureties of a guardian obtain, under the Act of 1762 (Rev., ch. 69, sec. 21), an order for counter-security, and at that time the guardian owes his ward, and never afterwards either returns an account nor makes a payment, no presumption of satisfaction at that, or any subsequent time, arises from his then being able to pay the sum he owed; and the sureties to the first bond were liable for it, although the order for counter-security expressly releases them.

DEBT upon a bond given by one John B. Jasper and his sureties, upon his being appointed guardian to Martha Jasper, with the usual condition in the printed forms to improve the estate of the ward and faithfully to account for it.

The breach assigned was, that Jasper had not paid over to the husband of his ward her estate in his hands.

The only plea upon which a question arose was upon that of performance, on which the following facts were proved before *Donnell, J.*, at BEAUFORT, on the last Fall Circuit. At February Term of the County Court of Hyde the defendant filed a petition against Jasper for counter-security, upon which an order was made "that Asa Bell and others, sureties for John B. Jasper, guardian of, etc., be released from this time for his guardianship, and that John B. Jasper enter into new bond with W. H. R., etc., sureties." This order, so far as it extended to the execution of a new bond, was complied with. By an account taken in the progress of this cause, which was not excepted to, Jasper was found to have been indebted to his ward at the time the new bond was given to the amount claimed in this suit. This amount was composed of money which either then was or ought to have been in his hands, debts due her on the hire of her negroes, etc. Jasper had made no returns of his guardian account to the County Court, and in fact had kept none.
(476) When the new bond was given he was embarrassed, but had property sufficient to pay the sum then due his ward. He had not paid any of the money in his hands, either to her or for her use, and became utterly insolvent before this suit was brought. For the defendant it was contended that as Jasper was able when the new bond was given

to pay the amount due his ward, the law presumed an application of his property to that purpose, so as to discharge the sureties in the first bond. But his Honor instructed the jury that, whatever might have been the presumption of law, had Jasper, after the execution of the new bond, kept and rendered due accounts of his trust, yet, as the contrary appeared to be the fact, no presumption of that kind arose.

A verdict was returned for the plaintiffs, and the defendant appealed.

Badger and *J. H. Bryan,* for the plaintiffs.

No counsel appeared for the defendant.

RUFFIN, C. J. Upon the proper construction of those parts of the Act of 1762 (Rev., ch. 69) intended to provide, at the instance of the sureties, for the removal of a guardian or for the indemnity of the sureties by counter-security, or a new bond as guardian with other sureties, and upon the effect of any one of those several orders, if made by the County Court, or upon that actually made upon the proceedings instituted by the defendant in this case, questions might have been raised which would call for the serious deliberation of the Court. Perhaps it may have been supposed by the parties that such would arise upon the statement of facts set out in the record. It is therefore incumbent on us to state that in our opinion they do not, lest an inference should be drawn from our silence that any of these questions are incidentally passed upon in our judgment.

The case comes before us on a single exception to the opinion expressed in the Superior Court on the effect of certain evidence offered by the defendant under his plea of *"conditions performed."* The plaintiff sought to charge him with the estate of the ward in the hands of Jasper, the guardian, in February, 1821, and with nothing more. (477) At that time Jasper gave a new bond, with other sureties, for his guardianship, and was embarrassed, but had estate of his own sufficient in value to satisfy the sum now found to be then in his hands. But the guardian, neither before nor after 1831, ever made return or account of the estate of his ward, nor applied any part of it to her use, and afterwards became insolvent.

Upon those facts the defendant prayed an instruction from the Court that the law presumed an application in 1821 of the guardian's property to the satisfaction of the debt to his ward, which amounted to a payment and performance of the conditions of the bond, and consequently discharged the sureties on the first bond. The Court held that the law did not raise the presumption insisted on, and there was a verdict and judgment for the plaintiff.

We concur entirely in the opinion of his Honor. There is nothing tending to create any presumption in favor of the defendant, much less that set up in the instruction prayed for. It is to be collected from the case that the guardian had wasted all the effects of the ward that were received before 1821, or applied them to his own use. The utmost that could, under any circumstances, have been asked was to presume that, without evidence to the contrary, he had those very effects in his hands when he gave the new bond, and, that being wasted afterwards, the new sureties were liable therefor, and consequently not the former ones. That would have called for the application of the Act of 1762. But the facts contradict the necessary foundation of such a presumption. Jasper was then an involved man, a careless and unfaithful guardian, not returning nor keeping any accounts, and was petitioned against by this defendant upon those very grounds; and never, in fact, paid or delivered over anything to the ward, nor, as far as appears, had at the time of giving the second bond any part of the ward's estate in specific articles, securities or otherwise. What room, then, is there for a presumption that his defaults have arisen exclusively since February, 1821, or that he then made good those that had previously occurred? There is no ground for it,
(478) but much for a contrary inference. If the case depended on this point, those of *Harrison v. Ward,* 14 N. C., 417, and *Clancy v. Carrington, Id.,* 529, would be decisive against the defendant.

The case is, however, still stronger for the plaintiff upon the point made. That admits that Jasper had not his ward's property actually in his hands, but was her debtor at the time for his previous receipts, and then claims that such debt was satisfied by the application of his property in discharge of it. Who applied his property to that purpose? He did

not; that is clear. Did the law? In what way? We cannot imagine any practicable method, for we believe the law never applies property to the payment of a debt without a change of the property, as in the case of an executor's retainer, or affixing to it a lien at the least, neither of which can be said to have taken place here.

The Court is therefore of opinion upon the case, as appearing upon the pleadings and the exception, that the defendant has not shown any presumptive performance, and, none actual being pretended, the plaintiff is entitled to a judgment.

Of course this opinion is not intended to affect, nor can it affect, the rights of the two sets of sureties as against each other, either in respect of contribution between them or of the obligation of the posterior set, as substitutes, to exonerate those who were prior, which rights depend on other considerations, and perhaps can be finally adjusted only in another tribunal.

PER CURIAM. Judgment affirmed.

Cited: Jones v. Hayes, 38 N. C., 509; *Harris v. Harrison,* 78 N. C., 215.

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(479)

CHARLES HAMLIN v. JOSEPH J. ALSTON.

Where one, upon the marriage of his daughter, made a parol gift of slaves to her husband, who died, leaving two infant daughters, and appointed the donor executor of his will and guardian of his children, to whom he bequeathed the slaves: It was *held*, that the donor might, under the Act of 1806 (Rev., ch. 701), resume the possession of them, although he had proved the will, hired them out, as guardian, during the minority of the legatees, and upon their marriage had procured a division to be made, and delivered the share of each in severalty.

DETINUE, for a slave. Plea, *non-detinet.* On the trial before *Donnell, J.,* at HALIFAX, on the Fall Circuit of 1834, the jury returned a verdict for the plaintiff, subject to the opinion of the Court upon the following facts:

In April, 1814, John B. Mebane of Chatham was in possession of this slave and several others, claiming, holding and using them as his own, and so continued until his death,

which took place in the year 1820. In July of that year he made his will, and thereby devised as follows: "I give and bequeath to my two daughters, Cornelia and Martha, and their heirs, forever, the following property, to be equally divided between them whenever either of them shall marry or come to lawful age, viz.: all my land, with its appurtenances, the whole of my negroes, with their increase, until that time." And thereof he appointed the defendant, his father-in-law, and John Mebane, his father, executors and guardians to his children. This will was proved by the defendant and John Mebane at the August Session, 1820, of Chatham County Court; and they immediately, in their character of executors, took all the slaves above mentioned into their possession and hired them out every year until the year 1832—first as executors, and afterwards as guardians of the children.

In the year 1831 the plaintiff intermarried with Cornelia, one of the children of John B. Mebane mentioned in his will, and after the expiration of the time for which the negroes were then hired out, viz., in January, 1832, three persons were selected by the executors and the plain-
(480) tiff to make a division of the slaves of which John B. Mebane died possessed, together with their increase. A division was made accordingly, and, the defendant being present thereat, he delivered to the plaintiff, in right of his wife, one moiety of them, including the slave in dispute, as his property under the will, and the plaintiff accepted them, took possession of them and retained them until some time in the following year, when the defendant took from the plaintiff several of the slaves, and among them that mentioned in the writ, and has ever since refused to return them to this plaintiff. Before the intermarriage of John B. Mebane with the daughter of the defendant, the slave was the property and in possession of the defendant, and, upon the said marriage, was, with several others, sent by the defendant to his son-in-law, but no written transfer of them to him was executed by the defendant. In the inventory of the estate of John B. Mebane, returned by the defendant and his co-executor, these slaves were not included, and the defendant had, upon the death of his grand-daughter Cornelia without issue, reclaimed them, contending they were his property.

Upon these facts his Honor set the verdict aside and directed a nonsuit to be entered, and the plaintiff appealed.

Badger, for the plaintiff.
Devereux and *Waddell,* for the defendant.

RUFFIN, C. J. The hardship of this case has caused the Court to hesitate in forming an opinion, and to be reluctant to pronounce it. It presents in a strong light some of the inconveniences and mischiefs that may arise out of the statute which requires gifts of slaves to be in writing, and tends to the conviction that perhaps the better policy would be to make the gift of a slave complete by delivering to a child, unless a trust be reserved or the bailment be manifested by writing. But, after anxious consideration, we have not been able to raise a doubt of the soundness of the law as held in the Superior Court. The argument for an estoppel is inconsistent with the Act of 1806 (Rev., ch. 701). That is a statute of frauds, so expressed in its very first (481) words and so declared in *Palmer v. Faucett,* 13 N. C., 240, and several other cases. Its purpose is to protect a supposed donor from any pretended gift proved by witnesses or to be inferred from any other act or thing other than those mentioned in the act itself. They are two only—a gift in writing and a delivery to a child who remains in possession at the death of the parent intestate. The words are negative, "that no gift shall be good unless," etc., and therefore those means are indispensable. There is no case under the Statute 29 Car. II. in which the want of the ceremonies required by it has been supplied by anything else. The design of the statute is to exclude all such evidence of the contract, and therefore in its nature it avoids anything which as an estoppel might defeat it. There can be no estoppel in a case of fraud, for the law avoids the act which would otherwise create it.

It is not necessary to give an opinion whether the acts of the defendant, in the character of executor of Mr. Mebane's will and as guardian of his children, could have created, in law, any temporary estoppel by force of which the defendant was bound to surrender the possession of the slaves to his wards at their arrival at age. If they could, it ceased when

the plaintiff took the slaves into his own possession. In the absence of a written donation, we are aware of nothing that can permanently bar a donor but an adverse possession of sufficient duration to be protected by the statute of limitations or an adjudication against him in an action for the slave. Such an adjudication would conclude, not because it established a gift in particular, but, generally, that the title was not in him.

The statute of limitations has no operation in this case. The possession of the plaintiff was not continued for three years after he demanded it from the defendant on a claim of right and acquired it upon the division. The defendant cannot be barred by his own possession. If, as argued, he held *as* executor, then he held as his testator did, namely, as his own bailee, which is absurd. The truth is, the defendant made a parol gift, which was void. He then made (482) a second to the plaintiff, which is likewise void. The argument is, in effect, that he made an intermediate gift to himself and Mr. Mebane, the grandfather, as co-executors, which precludes him from disputing the others. The answer is, that this third is also by parol, and therefore void, like the other two. It cannot be held otherwise without repealing the statute, and we are therefore obliged to affirm the judgment.

PER CURIAM. Judgment affirmed.

Cited: Alston v. Hamlin, 19 N. C., 122; *Overby v. Harris,* 38 N. C., 258.

SAMUEL RALSTON v. HUGH TELFAIR et al.

The next of kin has a right to have the probate of a will taken in common form recalled, and the will proved *per testes*, unless after notice of the probate he has been guilty of gross *laches*, or has acquiesced in the probate sought to be vacated; and this without making affidavit of recent discovered evidence to impeach the will: neither is the receipt of a legacy under the will, nor a claim by bill in equity of a trust in the whole estate an acquiescence which will bar this right.

PETITION, filed by the plaintiff, in which he stated that he was the father and next of kin of one Samuel Ralston, deceased, who had, by the contrivance of the defendant Telfair, made a will, whereby he bequeathed the bulk of his estate to the defendants, and whereof he appointed them executors. The plaintiff averred that he was a resident of the kingdom of Ireland, and that he had no notice of the will nor of the probate thereof. He alleged many circumstances tending to impeach the will, which it is unnecessary to state, and prayed that the probate granted to the defendants might be set aside and he be at liberty to contest its validity.

The defendant denied all the circumstances of fraud stated in the petition, and insisted that the will was fairly made and the probate honestly obtained; that the plaintiff had assented to it by filing his bill in equity seeking to establish a trust of the personal estate in his favor. *Ralston v. Telfair,* 17 N. C., 255.

Proofs were taken and other grounds of objection urged on the argument, which it is not necessary to (483) state, as they are substantially set forth in the opinion of the Court.

The case originally commenced in the County Court of Pitt, where a re-probate was ordered, which was affirmed by *Norwood, J.,* on the Spring Circuit of 1835; whereupon the defendants appealed to this Court.

Iredell and *Badger,* for the defendant.
Devereux, for the plaintiff.

DANIEL, J. This was a petition in which the plaintiff stated that he was the father and next of kin of Samuel Rals-

ton, deceased, late of Pitt County. The petition prays that the probate of the will of the said Ralston be recalled and set aside and a re-probate be ordered *per testes*, or in *solemn form*. The petition is resisted by the defendants in their answer (the executors, who are also the principal legatees named in the will) on three grounds: *First*, that the plaintiff was not the father and next of kin of the testator. *Secondly*, that if he was the father, he was now estopped and barred from proceeding in the suit, for that he had heretofore filed a bill in equity against these defendants as executors, and endeavored to establish and set up a resulting trust to himself as next of kin of a large portion of the personal estate of the testator; that he, by his bill in equity, had admitted that the will was made and duly proven. *Thirdly*, that the plaintiff had not made any affidavit, which he ought to have done, of any new fact coming to his knowledge, subsequently to the filing of his bill in equity, which should authorize or induce a court of probate to call in the probate and to order that the will be proven in solemn form. The case was heard in the County Court and a re-probate ordered. An appeal was taken to the Superior Court, where the judgment below was affirmed, and from thence it has been brought by appeal into this Court.

The counsel for the defendants contend, first, that the Judge erred in declaring in the decree *"that it was proved"* that the petitioner was next of kin of the deceased. It ought to be proved (say the counsel), as the deceased had never been married, that the petitioner was the father of
(484) the deceased and that he survived him. The declaration of the deceased that he had a father in Ireland is not sufficient evidence (say they) that this petitioner is the person.

The declarations of the deceased, as far as they go, are evidence against the defendants, as they claim under him. These declarations (as appears by the depositions taken in the former suit, which are made a part of the defendant's answer) not only admit that he had a father living in Ireland, but they go further and admit that his name was Samuel. We think that the declarations of the testator, connected with the admissions of the defendants themselves that this plaintiff filed a bill in equity against them, stating in

said bill that he was the father and next of kin of the testator, which bill was dismissed by the Court, not for want of proof of this fact, but upon the merits, are *prima facie* evidence to identify the plaintiff to be the Samuel Ralston, the elder, the father of the deceased, who had survived the testator and was his next of kin. Therefore the Judge did not err when he, in the decree, declared that fact was to him proven.

The next objection is, that the plaintiff has acquiesced in the probate; that he filed a bill in equity against the defendants, in which he admitted the paper was the *last will* of the deceased, and that it had been duly proven, and that he claimed as next of kin all the personal estate except a one-thousand-dollar legacy to Franklin Gorham as a resulting trust, admitting thereby that the defendants had been properly appointed executors and in that character held the property as trustees for him; that he had filed no affidavit of the discovery of any new fact, since the filing of his bill in equity, to ground the present application for a re-probate.

This objection, in our opinion, is not valid. The next of kin, as such merely, are entitled to call for proof, *per testes,* or in solemn form, of any deceased's will of common right. If, indeed, the executor propounds and proves it, *per testes,* of himself, which he may do—duly citing the deceased's next of kin to *"see proceedings"*—all next of kin so cited, generally speaking, are thereby forever barred. Acquiescence, unless for an unreasonable length of time, unaccompanied by any special circumstances, is not a bar of (485) this common right, even though accompanied by the receipt of a *legacy* under the very will sought to be controverted, if he will bring in his legacy. This has been determined in a great variety of cases. But the next of kin who calls in a probate, once taken, even in common form, and puts the executor upon proof, *per testes,* of his will, does it at the peril of costs. *Bell v. Armstrong,* 2 Eng. Eccles., 139, 140. If the next of kin, who has by parol demanded of the executor and received a legacy under the will, is not barred of his common right to call for proof of the will in solemn form, we cannot conceive that this common right will be barred by his demanding his distributive share by a written bill in equity (which is not on oath) of that portion of the

estate which he conceived and charged had resulted to him from the fraudulent imposition on the deceased by one of the executors who was the writer of the will, and that demand being refused by the Court upon the ground that no such trust appeared upon the will. The next of kin who has received a legacy under the will is never put to his affidavit of newly discovered facts before he is permitted to call for a probate *per testes*. He is only bound to bring in his legacy and give security for the costs, in case a decision be made against him. We do not feel authorized to demand such an affidavit in this case. The principle, however, which distinguishes this case and governs our decision is, that the plaintiff has never acquiesced; he only mistook his remedy in filing his bill upon a statement of facts not sufficient to support it, but sufficient to sustain this application. We think it is not a bar to his position. The judgment is therefore affirmed.

PER CURIAM. Decree affirmed.

Cited: Etheridge v. Corprew, 48 N. C., 17; *Randolph v. Hughes*, 89 N. C., 430; *In re Thomas*, 111 N. C., 413.

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(486)

SAMPSON BENNETT v. RICHARD C. HOLMES.

A judgment is conclusive between parties and privies, as to those facts only which it directly established, but does not tend to prove those which *may* be inferred from it. As in trespass *quare clausum fregit*, unless entered upon the plea of *liberum tenementum*, it is not even admissible in another action, between the same parties, or their privies, to prove title to the *locus in quo*.

TRESPASS QUARE CLAUSUM FREGIT, tried before *Norwood, J.*, at SAMPSON, on the last circuit. Pleas—1, not guilty; 2, a judgment in a former action of trespass, in which Ann Holmes had recovered damages of the present plaintiff for a trespass upon the *locus in quo*, with an averment that the defendant entered by the direction of the said Ann.

The plaintiff having made out a *prima facie* case upon the general issue, the defendant, upon the issue presented by

his second plea, produced the record of a judgment in the same court, whereby Ann Holmes recovered damages of the plaintiff for a trespass to the premises in dispute, and proved his entry to have been made under her authority. In this latter action the present plaintiff had pleaded not guilty, a license, the statute of limitations, and an accord and satisfaction. The presiding Judge intimated that this judgment was conclusive between the parties, and in submission to this opinion the plaintiff submitted to a nonsuit and appealed.

W. H. Haywood, for the plaintiff.
No counsel appeared for the defendant.

GASTON, J. We are of opinion that the record offered in evidence by the defendant was not admissible, either as conclusive or *prima facie* evidence of a title to the freehold in Ann Holmes. As the parties to the present suit were also parties or privies to the suit referred to in that record, the objection to its admission rests wholly upon its irrelevancy to establish the fact for which it was offered. It has been well remarked that a record is in no case direct and positive evidence of *any fact* which it recites as having been found by a jury or been otherwise ascertained. It (487) absolutely establishes no more than that those who passed upon the fact believed it to be as they have declared. 1 Star., 213. But public policy, awake to the necessity of preventing continual litigation upon the same subject-matter, requires that a matter once solemnly decided by a court of competent jurisdiction shall not be again brought into dispute between the same parties or their representatives. Therefore, a judgment of such a court directly upon the point is, as a plea, a bar, and as evidence conclusive, between the same parties and their privies; by *De Grey, C. J.,* in *Duchess of Kingston's case,* 11 St. Trials, 261. Every allegation of record upon which issue has been taken and found is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop them from again litigating *that fact* once so tried and found. *Outram v. Morewood,* 3 East, 357. But for this purpose it is necessary that the judgment should be direct upon the precise fact. The judgment is not evidence of any matter which is only

to be *inferred* from it by argument as having probably constituted one of its grounds. *Duchess of Kingston's case, ubi supra;* Har. Law Tracts, 457. To permit this would not end litigation, but would induce the necessity of unraveling the materials of the former adjudication, for it would be manifestly unjust to admit a presumption that a particular fact was established thereby, and yet not allow that presumption to be rebutted by proof that it is unfounded. 1 Stra., 198. A judgment, therefore, in any action is conclusive only as to what it directly decides. As the judgment is the fruit of the action, it must follow the nature of the right claimed and the injury complained of, and can conclude nothing beyond them. "In trespass, damages for an injury to possession are the only thing demanded in the declaration. The judgment can only give the plaintiff an ascertained right to his damages and the means of obtaining them; it concludes nothing upon the ulterior right of possession, much less of property in the land, unless a question of that kind be raised by a plea and traverse thereon." *Outram v. Morewood, ut sup.* In the record offered and received (488) there is no plea of *liberum tenementum,* or any allegation pleaded on either side averring title in or to the premises, and therefore the record was not evidence of any adjudication as to title. This distinction as to the effect of a judgment in an action of trespass, where an issue has been found on an allegation of title and where no such issue has been determined, is very clearly pointed out by *Lord Ellenborough* in his observations (in the case of *Outram v. Morewood,* above cited) upon the doctrine said to have been laid down by the Court in the case of *Bassett v. Bennett.* In that case a verdict had been taken for the defendant, both on the general issue and on the plea of *liberum tenementum,* whereas there was only evidence to support the finding for the defendant on the general issue. "The plea, if found, would be conclusive," says his Lordship, "that at the time of pleading the soil and freehold were in the defendant, and if properly pleaded by way of estoppel it would estop the plaintiff, against whom it was found, from again alleging the contrary. But if not brought forward by plea as an estoppel, but only offered in evidence, it would be material evidence, indeed, that the right of the freehold was at the

time as found, but not conclusive between the parties as an estoppel would be." And, accordingly, he adds: "In that case the proper course would certainly have been for the Judge at the trial to have discharged the jury from finding any verdict, on the plea of *liberum tenementum,* on which no evidence was given." 3 East, 364. The course which he recommends would have been proper simply because a judgment in trespass on the plea of general issue is neither conclusive by way of estoppel, when pleaded, nor material in evidence, when not pleaded, as to the right of the soil and freehold.

The judgment is reversed and a new trial is to be awarded.

PER CURIAM. Judgment reversed.

Cited: Long v. Baugas, 24 N. C., 293; *Burwell v. Cannady,* 48 N. C., 167; *Rogers v. Ratcliff, Id.,* 226.

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(489)

WILLIAM A. SPARKS v. DEN ex dem. RICHARD WOOD et al.

Although costs are not expressly given by any act of the Assembly organizing the Supreme Court, yet the power of giving a judgment for them necessarily results from the several Acts of 1810 (Rev., ch. 785, sec. 7), 1818 (Rev., ch. 963, secs. 6 and 7), and 1825 (Tay. Rev., ch. 1282).

AT THE last term the plaintiff, in an action between the parties to this motion, recovered judgment for his costs, and an execution issued for them as taxed by the clerk. The defendant in that action applied now to set the execution aside, upon the ground that costs were not recoverable in this Court.

No counsel appeared for the plaintiff in the motion, which was brought on in consequence of a written application of his, or from the return of the sheriff.

Iredell, for the defendant.

RUFFIN, C. J. Upon the decision of this case heretofore, judgment was rendered as well for the usual costs in this

Court as for those in the Superior Court, and the clerk accordingly issued an execution against the appellant and his sureties for the costs in the Supreme Court.

On behalf of the appellant a motion has been made to set aside the execution upon the single ground that costs are not recoverable here.

If that were true, it might be sufficient to say that it forms no objection to the process, but rather to the judgment, which obliged the clerk to issue it, and therefore this motion could not be sustained.

But we apprehend that the motion rests upon a total mistake in regard to both, and that not only is the execution warranted by the judgment, but the judgment itself is required by the law.

It has been the course of the Court, without a single exception, since 1810, to adjudge costs in all appeals, save only against the State. The Court could not overturn such a train of precedents without a mandate from the Legislature.

In truth, however, the rule owes its existence to the
(490) statute law, according to a necessary construction, if not the express letter.

In the origin of the Supreme Court no costs were given, for no judgment was rendered here. The only jurisdiction was of questions adjourned before judgment by the Judge of the Superior Court for the solution of doubts entertained by himself. But, as there might be error, though the Judge was confident of the contrary, the General Assembly thought it proper to give to the party himself, as a matter of right, the power to bring under revision the opinions of the Judge and the judgment of the Superior Court by way of appeal. Unless costs attended such appeals, it might be expected that, for the sake of delay or through contumacy, almost every case would be brought up. It was most natural, therefore, that the grant of the right of appeal should be accompanied by a provision for costs. Accordingly, the very first act which allows of an appeal—1810 (Rev., ch. 785, sec. 7)—provides that the appellant shall give bond, etc., and "that the Supreme Court shall adjudge costs to be paid by the party cast, and execution shall issue therefor in like manner as from the Superior Courts." The fee-bill is, indeed, set forth in the act, but in the opinion of the Judges that omission did not war-

rant them in disobeying or disregarding altogether the express command of the statute. They conceived it to be their duty to adjudge *reasonable* costs, upon a principle of construction, of ancient origin and universal application, that defective provisions as to matter of detail in a remedial statute must be supplied, rather than the positive general enactments should be rendered impotent. The Judges of that day therefore adopted for this Court the fees which the Assembly had prescribed for the old District Courts, as they had been the highest courts created in this State antecedent to the establishment of the Supreme Court. In conformity to that rule, and within the knowledge of the profession and of the Legislature, costs have been taxed by the clerk and adjudged by the Court in every intervening case up to the present time; and we are not without surprise that a doubt of the propriety of so doing should be started at this late day.

The Acts of 1818, it is true, have nothing express about costs here *nominatim*. But it seems plain to (491) us that they were intended to be and are continued by those acts. The whole jurisdiction and powers of the preceding Court are transferred to the present Court; and, in the next place, no cause is to be brought here but by appeal, in which the appellant must give bond, with sureties. In that provision criminal cases are included in which it would seem that the bond can cover nothing else but costs, since a recognizance or imprisonment secures the appearance of the accused; and certainly the sureties are not to represent him in suffering the punishment. But, besides all that, the sixth and seventh sections of the supplemental act provide that the Supreme Court shall render judgment on the appeal bond in the same manner as a Superior Court may on an appeal from the County Court; and in case the appellant shall fail to file the record the Clerk of the Superior Court shall, after certificate from this Court, issue execution as though no appeal had been prayed, taxing double costs against the appellant. What costs are those? Surely not double the costs before adjudged in the Superior Court, including witnesses and process of every kind; but, in analogy to the Act of 1777 (Rev., ch. 115, sec. 77), it means double the costs taxable in the Supreme Court, according to the known course of that Court under the Act of 1810. The recognition of that course

is also found in the subsequent Act of 1825 (Taylor's Rev., ch. 1282), so explicitly as to remove every difficulty. The object of this last statute is to require the payment of the costs in the respective courts, to be made at points most convenient to the persons entitled to the several portions of it. It authorizes the Clerks of the Superior Courts to issue execution for the costs incurred in those Courts, "and the Clerk of the Supreme Court to issue execution for the costs incurred in that Court." As a legislative exposition of prior statutes, or as a confirmation of the previous judicial *regula generalis*, and of the practice under it, here is an expression too plain and precise to be evaded or resisted. It is a full answer to the motion, which must be refused.

PER CURIAM. Motion refused.

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(492)

JAMES D. BRIDGES v. MALCOLM PURCELL et al.

One whose land is overflown by a mill-pond has a right to recover for the damages done him, notwithstanding his ancestor consented, by parol, to the erection of the dam, and the consequent overflow of his land; for if it be the grant of an incorporeal hereditament, it is void, for want of a deed—if a mere authority, it can be revoked, and ceases with the life of the grantor.

PETITION filed by the plaintiff for an injury to his land and dwelling, caused by a mill-pond of the defendants.

Upon the trial before *Strange, J.*, at ROBESON, on the last Fall Circuit, the only question being whether the plaintiff had a right to recover, and if so, how much, the defendants proved that the father of the plaintiff, under whom he claimed, being informed previously to the erection of the dam, by the person under whom they claimed, of his intention to build a mill, expressed his satisfaction at the prospect and gave his permission to raise the dam as high as might be necessary.

His Honor informed the jury that, if they believed this testimony, the plaintiff could not recover, unless the dam had, subsequently to the license, been raised still higher.

A verdict was returned for the plaintiff, but he, being dissatisfied with the amount of damages, appealed.

No counsel appeared for either party.

GASTON, J. The error assigned upon this appeal is to be found in an exception to the charge of the Judge. The instruction complained of lays it down for law that if the owner of a tract of land has by the erection of a mill-dam ponded the land of another under a parol license from him, those who succeed to the estate in the land thus ponded cannot, because of a continuance of the nuisance, recover against the alienee of him who erected the dam, unless the dam has been raised to a greater height than was originally permitted. We suppose that this instruction is founded upon a principle, recognized or thought to be recognized in several adjudications, that a verbal authority is not only an excuse for what has been done under it, but cannot be coun- (493) termanded, if once acted upon, without at least putting the person licensed in the same condition wherein he was before acting on the license. The occasion does not call upon us to examine the correctness of this principle or to define its extent should the correctness be admitted; and on questions of acknowledged difficulty, where we have not the benefit of a discussion (and in this case there has been no counsel), we feel ourselves bound to exercise caution in forbearing to decide any unnecessary point. The cases that bear upon this doctrine, so far as we know of them—and they are accessible to us—have been carefully examined, and the result is a conviction that they do not warrant the instruction given, or, if they do, that the instruction, notwithstanding these decisions, is nevertheless erroneous. One of the latest of these decisions is *Liggins v. Inge,* 7 Bing., 682. It is not amiss to remark the extreme caution with which that case is spoken of by *Chief Justice Denman* in delivering his very able opinion and the judgment of the Court on the case of *Mason v. Hill,* 5 Barn. & Ald., 1. Supposing it, however, to have been properly decided (of which we say nothing), it seems to us to have been determined on grounds not applicable to the subject now under consideration. In that case the plaintiff's father, by parol license, had permitted the defendants to lower the banks of a *river* and make a weir above the plaintiff's mill, whereby less water flowed to it than before;

and it was held that the plaintiff could not sue the defendants for refusing to raise the bank to its former height, and to remove the weir and thus continuing the *diminished* flow of water to the plaintiff's mill. The determination is distinctly placed upon these positions: that the water in the river is public property, open to the use of all; that the party who first appropriates to his own use any portion of it flowing through his own land has the right to the use of what is thus appropriated against all others, and that the water, after such appropriation, may be given back to the public and then appropriated by other individuals to their use. The parol license was regarded, not as transferring to the defendants any right or interest in the water accustomed to flow
(494) to the plaintiff's mill, but as giving back and yielding up to *the public,* for the use of whoever might afterwards appropriate it, *that quantity* of the water which found its way over the weir and the lowered banks. In the present case the defendants claim the privilege to throw the water of their mill-pond *upon the land of the plaintiff.* They certainly have it not of common right. They claim it as having belonged to their vendor because of a license from the former proprietor of the plaintiff's land, and as having been transmitted to them along with his sale of the land, which they hold as an appurtenance to the thing thereby conveyed.

The case of *Taylor v. Waters,* 2 Mars., 551, and 7 Taunt., 374, though connected with this subject, decides nothing upon this question. It decides that a license of free admission for the term of twenty-one years to a theatre on nights of public exhibition, granted for a valuable consideration, is valid. It also decides that such a license may be granted by parol, notwithstanding the statute of frauds. Of the first position we see no cause to doubt. A license for a valuable consideration for a specified time is in law a grant of the thing or the use thereof for that time, and, by force of the executed contract, as a lease or a grant, passes an irrevocable right during the time to the privilege thereby granted. Popham, 151; Vin. Abr., tit. *License;* E. Vaughan, 351.

The correctness of the second position has been questioned (see 2 Chitty's Prac., 339, and Sugden on Vendors, 57), and is opposed by a strength of reasoning not easily answered.

But we have no concern with it. Our statute of frauds certainly does not embrace such a license, whatever interest it may pass, for that statute applies not to *executed* contracts. The case of *Winter v. Brockwell,* 8 East, 309, comes from a high authority. The plaintiff brought an action on the case for a nuisance in erecting a sky-light over an open area, by means whereof the light and air were kept from his windows, and noisome smells arising from the adjoining house were forced into them. On the general issue the defendant gave in evidence that the erection complained of was made with the plaintiff's express approbation, but that after (495) it was finished the plaintiff became dissatisfied and required it to be put down. *Lord Ellenborough* admitted the point to be new to him, but he thought it *unreasonable* that after a party had been led to incur expense in consequence of having a license from another to do an act, and that license had been acted upon, the other should be permitted to recall his license and treat the first as a trespasser for having done the act. At the trial he instructed the jury that the plaintiff could not recall his license without offering to pay all the expenses incurred. When a motion was made by one of the counsel for a new trial, *Lord Ellenborough* remarked that he found himself justified in the opinion he had given the jury by the case of *Webb v. Paternoster,* and thereupon the counsel waived the motion. It is impossible, I think, not to feel, with *Lord Ellenborough,* that the plaintiff's conduct was unreasonable, and that he ought not to be permitted to insist on the erection being destroyed without some compensation to the defendant for the expense incurred. The *quantum* of compensation could not be ascertained in that action, and the question would seem to be whether compensation must be made before the license can be revoked *at law,* or whether a *legal* revocation could not be made, and then the execution of the judgment enjoined until compensation made. The case of *Webb v. Paternoster* (said to be best reported in Palmer, 71) was determined upon the point, not that the license was not countermandable, but that it was a license for a convenient time only, and that such time had expired before the act done, whereof the plaintiff complained. Two of the Judges, *Montague* and *Haughton,* expressed an opinion that

the license, which was a permission from the owner of the land to put a cock of hay thereon for a reasonable time, passed an interest which charged the land in the hands of the lessee, notwithstanding a countermand. *Doddridge* doubted thereof, but remarked, among other things, that every license which is *in its nature a license* is countermandable; and *Haughton* then said that there was a distinction between the (496) licenses executed and licenses executory—that the former were not countermandable, but the latter were. It is not improbable that he regarded the former as irrevocable because they passed an interest. As the case occurred in the reign of James I., long before the statute of frauds, it was argued and decided on common-law principles. The case of *Wood v. Lake,* in Sayer, 3, does not apply. There, according to the reporter, it was held that an agreement for one to stack coals on another's land for seven years may be granted by parol, because it is not an interest. The reporter is confessedly an inaccurate one. The decision, if made, is clearly wrong (see Sugden on Ven., *ut supra; Phillips v. Thompson,* 1 John Ch., 131); but if the decision were right it bears not upon the present point.

A license is a power or authority given to a man to do a lawful act. Unquestionably, no countermand can make the act done under it illegal. Here it was not a license to erect a dam, for no license was needed for any such purpose. It was a license, by means of a dam on his own land, to pond water on the land of him who gave the license. It is often difficult to distinguish between a license or a mere authority, and an interest or a license coupled with an interest. It necessarily follows that what is done under either, while in force, is binding upon him who has granted it. Until the license was revoked, the keeping of the water upon the land was lawful. It is a general principle that a mere license may be countermanded; and it is equally a general principle that an interest once passed cannot be recalled. The extent of the grant, whether it be of an authority or an interest, depends not on any technical words, but upon the intention of the parties. Whether a license to do an act which in its consequences permanently affects the property of him who gives it, when so acted on that what is done cannot conve-

niently be undone, may be regarded as the grant of an interest to the extent of the consequences thereby authorized, and therefore not revocable, or whether such a license does not necessarily imply a permission for the thing done to remain, notwithstanding the continuing consequences; and therefore the licenser, on a principle of good faith, may be forbidden to withdraw it without indemnifying him who (497) trusted thereto. Whether these, or either of these, principles can or cannot be extracted from the adjudications, we are of opinion that they do not uphold the instructions complained of. The right to pond water on another's land is an incorporeal hereditament—a right not indeed to the land itself, but to a privilege on and upon the land, impairing to that extent the dominion of the proprietor therein. Set up as a permanent interest granted to the vendor of the plaintiff, transferable by him, passing with the land to the defendants, it is inoperative, because it is a freehold interest and cannot pass but by deed. Regarded as a mere license, however irrevocable, between the parties (if, indeed, there can be such without an interest), it is difficult to see how it can be binding between the plaintiff and the defendants. The ancestor of the plaintiff granted *a license,* and the plaintiff has succeeded to all his *estate.* Now, if the effect of the license be not to pass any interest out of, or impose any charge upon the land, the plaintiff has succeeded to an unlimited and unshackled fee-simple therein. A mere authority necessarily ceases with the life of the grantor. The plaintiff's ancestor granted a license to the *vendor of the defendants.* But, regarded as a *license,* how does it enure to the benefit of the defendants? If it passed as an *appurtenance* to the land, it partook of its nature; it was more than an authority—it was a hereditament. To hold that a permission thus given shall operate forever for the benefit of the grantee and his assigns against the grantor and his heirs would be, in effect, to permit a fee-simple estate to pass under the name of an irrevocable license. Purchasers would never know what incumbrances were upon their lands; and instead of the solemn and deliberate instruments which the law requires as the indispensable means of transferring freeholds,

valuable landed interests would be made to depend wholly on the integrity, capacity or recollection of witnesses.

The judgment is reversed, with directions to the Court below to award a new trial.

PER CURIAM. Judgment reversed.

Cited: Carter v. Page, 26 N. C., 431; *McCracken v. McCracken,* 88 N. C., 277; *Pitt v. Moore,* 99 N. C., 91; *Railroad v. Railroad,* 104 N. C., 669; *Hall v. Turner,* 110 N. C., 302.

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(498)

EDWARD R. and JOHN A. DARDEN v. JAMES MAGET, executor of JETHRO DARDEN.

1. An application to the County Court, by an executor, for an order appointing commissioners to divide the estate of his testator among the legatees, without any proceeding to make those legatees parties, is merely *ex-parte*, and will not authorize the Court to enter judgment of confirmation so as to bind the legatees; nor to make an order that such of the legatees as came in voluntarily and opposed the confirmation of the report, shall pay the costs.

2. An appeal lies to the Supreme Court, from all acts of the Superior Court professing to be final adjudications on questions of right, notwithstanding such adjudications may be irregular and void.

3. An *ex-parte* proceeding, upon which no judgment can be given affecting others, is not comprehended in the term "action," as used in sec. 90 of the Act of 1777 (Rev., ch. 115), and upon an appeal to the Supreme Court, from an irregular judgment of the Court below, by a person not a party to the proceeding, the Court may in its discretion adjudge that neither party to the appeal shall pay costs.

AN APPLICATION was made *ore tenus* to the County Court at HERTFORD by James Maget, styling himself executor of Jethro Darden, deceased, for an order appointing commissioners to divide the negroes of the deceased among his legatees according to the terms of the will. An order was thereupon made appointing commissioners, who made a return of their proceedings, to which an objection was taken by Edward R. Darden, claiming to be one of the legatees; whereupon the report was set aside and a new order made, re-

appointing the same commissioners. These commissioners made a second report in precise conformity with the former, to which many exceptions were filed by Edward R. Darden and John A. Darden. These exceptions were overruled by the Court, and it was thereupon ordered that the report be confirmed, and that Edward R. Darden and John A. Darden pay the costs. From this sentence they appealed to the Superior Court, where, before his Honor, *Judge Dick,* on the last circuit, it was "ordered by the Court that the exceptions be overruled and the report of the commissioners be confirmed; and further ordered by the Court that Edward R. Darden and John A. Darden pay the costs of this suit from the time of filing their exceptions in the County (499) Court"; from which order they appealed to this Court.

Iredell, for the appellants, objected to the report as being *ex-parte,* and that it should be set aside.

Kinney, for the appellee, admitted that the decree had no binding force, but contended that the appeal must be dismissed, as there were properly no parties to it.

GASTON, J., after stating the case, proceeded: The merits of this controversy have not been argued before us. The counsel on both sides have agreed in the opinion that the proceedings were so irregular as not to warrant any judgment. There was no petition setting forth the provisions in the will of Jethro Darden, or the parties between whom a division was sought to be made. There was no action constituted by any process to give the Court jurisdiction in relation to the matters on which it professed to adjudicate. The return of the commissioners appointed on the application of the executor might properly have been filed as evidencing *his* disposition of the estate of his testator, but it received no validity from the sanction of the commissioners; it had no operation except against those who acquiesced in it, and it called for no confirmation from the Court. It was analogous to the ordinary case in which an executor or administrator returns an account to Court of his administration of the estate, usually, indeed, examined by auditors, but regarded as entirely *ex-parte* and binding on him only. The inter-

ference of the appellants with the return was inofficious, and the various orders passed thereon without authority. The division was the division of the executor and of such of the parties as concurred therein, and its propriety could only be investigated by the Court, in some action appropriate for that purpose. If the Court had no authority to act judicially upon the return of the commissioners, it was equally without authority to give judgment to either party for costs. Costs are damages adjudged to the one party because of the unjust suit or defense of the other. Where no action has been constituted, costs cannot be adjudged.

(500) It has been insisted that upon this view of the proceedings the Court ought to dismiss this appeal; for that in contemplation of law, what purports to be the judgment of the Superior Court is a mere nullity. Without admitting it to be so, we think, nevertheless, that it may be reviewed by appeal. This is the only mode known in the State for the correction of the legal error of that tribunal, and we understand the laws regulating the Supreme Court as authorizing appeals to it from all acts of the Superior Court which purport to be final adjudications on questions of right.

The judgment of the Superior Court must be reversed as erroneous. Not considering the case to be comprehended within the term "actions," as used in sec. 90 of the Act of 1777 (Rev., ch. 115), and believing that the costs of the appeal are therefore at our discretion, we think it right, in a matter of mutual mistake and blunder, to adjudge no costs to either party.

PER CURIAM. Judgment reversed.

STATE v. MERRIL MILLER.

1. Where the defense of a person indicted for murder, as disclosed by his witnesses, consists of a justification, and the Judge, in his charge, takes it for granted that the homicide was committed by him, he does not thereby violate the Act of 1796 (Rev., ch. 452), forbidding the expression of his opinion as to the weight of evidence, because the justification necessarily admits the homicide, and its validity cannot be examined, except upon the supposition that it was committed by him who seeks to justify it.

2. Misconduct in a juror in a capital case, as a separation from his fellows, or eating or drinking without the permission of the Court, before delivering the verdict, held by RUFFIN, C. J., and DANIEL, J., to be a reason for applying to the discretion of the Judge, in the Court below, for a new trial, and not to render the verdict a nullity, and a *venire de novo* proper.

3. But per GASTON, J.—Any unauthorized and unexplained separation of a juror from his fellows, in a capital case, in law vitiates the verdict, and a *venire de novo* should be awarded. Minor irregularities are grounds for a new trial, addressed to the discretion of the Judge who presided at the trial.

4. The effect of a separation of the jury, before they return their verdict, and the difference between a new trial and a *venire de novo*, discussed and stated at length by RUFFIN, C. J., and GASTON, J.

THE prisoner was tried before *Settle, J.*, on the last circuit, at WAKE, for the murder of John Whitaker.
On the trial, the witnesses for the prosecution swore, (501) that the prisoner came, about 9 o'clock A. M., with a stick, to a house where the deceased was sitting, and there a fight took place between the prisoner and the deceased, in which the prisoner fell, with the deceased upon him—that immediately afterwards the son of the prisoner came up, when a separation took place, and the deceased retired, but was pursued by the prisoner and his son, and the mortal blow given. Upon the defense, one Woodall was called, who deposed, that soon after sunrise of the same morning, he saw the prisoner and the deceased in company, when the deceased struck the prisoner with a small stick; upon which the prisoner took it from him and threw it away, saying, that he did not wish to injure the deceased. This witness stated that the prisoner greatly exceeded the deceased in bodily strength.

"After the evidence was closed on both sides, some of the jury desired leave to retire, and the Judge, without any objec-

tion being made by the prisoner or his counsel, put the whole jury in charge of the sheriff, and permitted them to retire together. The jury accordingly retired out of the court-house in charge and custody of the sheriff. A few minutes afterwards the sheriff returned into the court-house with eleven of the jury only. Thereupon the clerk was directed to call over the names of the jury, when Henry Gorman, the juror whose name was third upon the list, did not answer; but in less than two minutes, he returned into the court-house, when the Judge expressed his strong disapprobation of the juror's conduct; but upon the juror's stating that he was obliged to step aside to obey the calls of nature; and some of the bystanders testifying that the juror was a good, well-meaning man, and would not knowingly, on any consideration, have violated a rule of law or of the Court, no punishment was inflicted by the Court. The jurors then took their seats in the jury box, and the trial proceeded, without objection on the part of the prisoner or his counsel. His Honor, after stating to the jury the leading principles by which a homicide was mitigated from murder to manslaughter, proceeded as follows: "That they (the jury) would in-
(502) quire why it was, or how it happened, if they believed the witness Woodall, who stated the great superiority of bodily power the prisoner possessed over the deceased, that he was at the bottom in the fight and scuffle, and continued there until the deceased disengaged himself from the prisoner and attempted to go off, without using the stick in the meantime, which he, the prisoner, held in his hand. That if they believed it was with a view to make the deceased strike, so as to afford a provocation to take his life, it would be no extenuation of the prisoner's offense. And that if they collected from his testimony that the prisoner was not laboring under a strong excitement, immediately after he and the deceased separated, the law did not allow him to raise himself up into a gust of passion, and pursue the deceased, at the time and place stated by the other witnesses, to take life, and allege that his offense was reduced to manslaughter by the provocation."

The prisoner was convicted, and a new trial was moved for.

1. Because his Honor had, in his charge, violated the Act of 1796 (Rev., ch. 452), restraining a judge from ex-

pressing, in his charge to the jury, an opinion that a fact was proved.

2. Because the jury, after being charged with the prisoner's case, separated before they agreed in their verdict, and gave it in to the Court.

A new trial having been refused, the counsel for the prisoner then "offered to prove that while the juror Henry Gorman was absent from the body of the jury he visited the store of W. J. Lougee & Co., to get a drink of spirits, which (store) stands at the distance of one hundred or one hundred and twenty yards from the court-house, and in view of it"—which the Court refused to receive. The place to which the absent juror went was about seventy or eighty yards from the court-house, but out of the way and retired. Judgment of death being pronounced, the prisoner appealed.

W. H. Haywood, for the prisoner.
The *Attorney-General,* for the State.

RUFFIN, C. J. One of the objections on which the motion for a new trial is founded is, that the pre- (503) siding Judge expressed or intimated an opinion that certain facts were proved. This is supposed to have been done in those parts of the charge, in which the Judge said to the jury that "they would inquire why it was, or how it happened, if they believed the witness Woodall, who stated the great superiority of bodily power the prisoner possessed over the deceased; that he was at the bottom in the fight and scuffle, and continued there until the deceased disengaged himself from the prisoner, and attempted to go off, without using the stick in the meantime, which the prisoner held in his hand; that if they believed it was with a view to make the deceased strike him, so as to afford a provocation to take his life, it would be no extenuation of the prisoner's offense; and that, if they collected from his testimony that the prisoner was not laboring under a strong excitement, immediately after he and the deceased separated, the law did not allow him to reason himself up into a gust of passion, and pursue the deceased, at the time and place stated by the other witnesses, and take his life, and allege that his offense was

reduced to manslaughter by the provocation." It is said that in these observations the Judge assumed as facts that the witnesses for the State had truly testified: first, that the prisoner did kill the deceased at the time and place mentioned by them; and, secondly, as to the circumstance, that in the scuffle the prisoner fell at the bottom. To appreciate the force of these objections, it is necessary to recur to the nature of the testimony of Woodall, and the defense of the prisoner as founded on it. His testimony related to transactions between the prisoner and the deceased, in the morning of the day on which the homicide happened, and was relevant only as it tended to show a provocation then received, which, in law, would mitigate the crime to manslaughter. That must have been the point contended for in defense. The Judge was examining that point, and advising the jury of the law on it. In the very nature of it, and for the purposes of that inquiry the death of the party is presupposed; for every justification or excuse admits that to have been done which is sought to be justified. The (504) objection, therefore, does not apply to the conduct of the Judge more than to the defense of the prisoner himself. The jury could not have been misled, for with any intelligence, they must have understood that the fact of the homicide must be established to their satisfaction; and that both the defense of the prisoner, in reference to the provocation, and the charge of the Judge, related to a question which would be consequent on their determination of the main point of the death. On the general character of the case, including that principal point, the Court had previously instructed the jury; and as no exception is taken to that part of the charge, it must be understood by us that the Judge did not, at that time, intimate his opinion upon the credit to which the witnesses, who deposed to the deed itself, were entitled. Having, in a proper manner, performed his duty thus far, he could not discuss the point raised by the testimony of Woodall, but in connection with a supposed deed, such as the other witnesses had represented. But the jury could not have inferred therefrom that the Judge held the fact to be established for any other purpose than that to which he was then calling their attention.

We think the other part of the objection is equally untenable. The witnesses for the State deposed to all the circumstances of the fatal rencounter; among which was the one that when the parties went out of the house, a scuffle ensued, the prisoner fell, and the deceased on him. It is said the Judge assumed this to be true, and in that respect erred. If that assumption be made, it is manifest that it could not be to the prejudice of the prisoner. We attach, indeed, very little importance to the circumstance in itself, for in a scuffle the stronger combatant may come to the bottom from many accidental causes, and not by design on his part, or the superior advantage or skill of his adversary. But it is a circumstance which of itself tends to establish that the person thus found at disadvantage was not the more powerful, or did not bring on the engagement; so that an inference therefrom favorable to the prisoner might have been pressed on the jury. As the evidences of the fact came from the (505) witnesses against the prisoner, he might insist that it must be taken for true as against the State, and surely he cannot complain that the Court yielded to the force of that argument on his behalf. It is said, however, that there was at least an intimation that the prisoner played a feigned part on the occasion—of which there is no evidence. We are unable to perceive any such intimation. An inquiry into the cause of the prisoner's fall is advised—whether it happened by accident or design. But there is not the slightest intimation that it was by design. It is assumed that it might have been so, and so unquestionably it might have been. If it was by design, then the deductions just mentioned in favor of the prisoner could no longer be made from it, but it would give rise to others of an opposite character. The instructions actually given were therefore correct, in point of reason and law. If they were, they are not erroneous, although (as we think is the case here) they might be unnecessary and immaterial. If the Judge, in summing up, deemed it prudent to notice a circumstance so unimportant, we do not perceive how it could be to the prejudice of the prisoner, unless he should, in relation to it, lay down some rule wrong in itself; and that is not pretended. He certainly left the inquiry of fact entirely to the jury. It might be immaterial, but it could not be harmful to the prisoner;

and as to the legal consequences from the result of the inquiry, if one unfavorable to the prisoner could be found, we concur with his Honor.

In the opinion of the Court there is no cause for a new trial in this part of the case.

It is further insisted that the prisoner is entitled to a second trial, first, for the separation of one of the jurors from his fellows before the verdict was rendered, and secondly, because that juror, during the separation, drank spirituous liquor.

In relation to the latter reason, if we thought it in itself sufficient, there might perhaps be insuperable difficulties in the way of our taking notice of it upon this record. The point was not brought forward until after a mistrial (506) had been moved for upon another ground, and disposed of; and perhaps the Court refused to consider it then, because it was not in due time, according to the orderly proceedings of the Court. Again, 2 Hale P. C., 306, lays it down, "that if a juror eat or drink at the charge, for the purpose of the prisoner, and the verdict find him guilty, it is good; but if it find him not guilty, and this appears by examination, the Judge before whom the verdict was given may record the special matter, and thereupon the verdict shall be set aside." In the next page he states the case of the jury sending for a witness to repeat his evidence, who doth it accordingly: "this appearing by examination in court, and indorsed upon the record or *postea,* will avoid the verdict." A court of errors cannot notice any facts but those appearing in the record; and it appears from the passages cited how matter of this sort ought regularly to appear. Here the record does not set forth that the juror in fact drank spirits, but only that the prisoner offered to prove that he went to get a drink. The presiding Judge is from necessity exclusively to determine the facts. It might be that he did not believe the evidence offered, or it might be, that if heard, it would not have satisfied him of the material fact, that the juror really drank, since it only professed to go to the extent that he went for that purpose, and not that he consummated it. On the other hand, if the objection be valid in law, and the Judge refused the proof, because he deemed the objection invalid, it may be fairly urged that the facts as offered

to be proved, and every reasonable inference from them, ought to be considered as stated in the record; it is thus when an exception is taken to the opinion of the Court against the admissibility of evidence. The error is in excluding such evidence, and therefore it cannot be considered that the the facts to which it relates were established, but that they would have been, if the evidence had been received; and because those facts, when established, would, in law, produce a different result, the judgment given is reversed. It would seem to me that the justice of the Court, not to say the humanity of the law, would mete to a prisoner the like benefit in a case of this sort. I should be extremely reluctant to decide a capital case against the accused upon so (507) nice a distinction, since it is altogether uncertain whether the Judge failed to state the facts directly and with the utmost precision, because he did not find them upon examination, or because he would not enter into the examination, since he deemed the facts immaterial. In favor of life, I would, in such a case of doubt, rather take the latter presumption, and suppose the case was sent to us to determine the law upon the facts, rather than to consider whether the Judge had rightly judged of the facts upon the evidence. I make these observations with a view to draw the attention of counsel and those who preside at trials to future cases, rather than as material in the present; which we think does not depend on the mode in which the record brings the point before us. Admitting that the juror did drink, and that the special matter had been recorded by the Judge, it is our opinion, that it does not avoid the verdict. It is true that it was not brought forward in this light in the Superior Court, nor in the argument in this Court, but in each was treated as a ground for a new trial. In that sense, it must be addressed exclusively to the Judge who tried the cause. But the true and legal consequence from such misconduct of a jury as vitiates the verdict, is not that the verdict is to be set aside as erroneous, but that it is null, and that there has been a *mistrial.* For that reason, a *venire de novo* was awarded, long before new trials, in the modern sense of the term, had any existence; and in the passage in Hale, P. C., already quoted, it is stated, that the rule applies as well to verdicts for a prisoner, as to those against him, although a

new trial, even to this day, cannot in England be granted in a capital case. But it is our duty to give the prisoner all the advantage to which the whole record entitles him, and to pronounce that there was a mistrial, if it be such in law, although he did not take that specific objection; as it would be to arrest the judgment for any other defect. We have therefore taken into consideration both of the objections to the conduct of the juror, as constituting or not, a mistrial.

(508) It is obvious, upon a slight acquaintance with the history of the law, that there has been, in different ages, a great difference in the degree of strictness practiced towards jurors. It is laid down anciently, that a jury once charged cannot be discharged before they render a verdict, nor can they separate, nor can they eat or drink, without license from the Court. This we find as a general proposition, without any qualification as to cases of felonies or misdemeanors, or cases civil or criminal, or referring, except as to eating or drinking, to leave first granted by the Court. As regards the particular misconduct of eating or drinking, 2 Hale Pl. C., 306, says, "that though it be not at the charge of either party, anciently it was held it would avoid the verdict," and refers to the Year-book, 24 E., 3, as his authority; yet, in the next sentence, it appears that it was in his day, and had been ever since 14 Hen. VII., *settled,* that unless it be at the charges of a party, it is only a misdemeanor, finable in them that do it, but avoids not the verdict. This is found in a treatise exclusively on the crown law, and therefore the modification must be taken to embrace criminal cases. My Lord Coke lays down the same doctrine, Co. Lit., 227. We know, indeed, that innumerable cases are found in which it has been applied to civil suits, but they had no connection with the subject on which My Lord Hale was writing, and he cannot then be supposed to allude to them. We are not aware of any adjudication in England or in this country, in accordance with the most ancient rule of Edward III.'s time, but in New York. In that State, it seems that drinking is not tolerated in any shape, during the progression of the trial, and if the liquor be even given by consent of the parties to a civil cause, it vitiates the verdict. We think, however, that the usages of our own State, sustained by the clear and venerable authority cited by My Lord

Hale, ought to outweigh with us the opinion of the most respectable Judges of our sister State. This particular question has moreover been considered and determined by this Court, in a capital case. In *State v. Sparrow,* 7 N. C., 487, I made the objection myself, but the Court held unanimously that it had been settled rightly that taking refreshments vitiates the verdict only in those cases where they are furnished by the party for whom the verdict is found.

I do not dispute that if a juror drink to excess, so as (509) to disqualify himself for his office, it is not only a gross misdemeanor, but it ought to vitiate the verdict. I will not deny that such a case appearing in the record could be acted on by a court of error. It can, however, be supposed to occur so seldom, as to render such a jurisdiction almost idle and unnecessary. The necessity for it rests upon the possibility that a Judge would take and retain a verdict from such a jury, which would be a monstrous act. But the supposition that any Judge would commit such an act is in itself equally improbable and monstrous. It is impossible but that the jury would be kept together until they became capable of deciding, or that in a case in which a new trial was allowed, the verdict would be set aside and the cause retried. But on the present case it does not appear that the juror did not provide himself with the spirit, and there is no suggestion that he drank to the slightest degree of intoxication. In our opinion, this misconduct does not render void the verdict that has been taken; we could not hold that, without at the same time declaring that we would treat in the like manner a contrary verdict, which would be a doctrine alarming to the whole community.

Reasons of the like kind bring me to a similar conclusion upon the subject of the other act of misconduct in the juror. I cannot think that an absence of a juror for two minutes from the body of the jury, without communication with any person, as far as appears, upon this or any other subject, but to ask for a drink, does, by itself, annul the finding. It is true that I am not able to adduce an English adjudication in point, in a case which appears to be capital; and but one of that description in this country, in which an opinion, similar to that entertained by myself, is expressed. But it is to be remembered, that the rule itself, as anciently laid down, is

not by its terms restricted to capital cases. It embraces alike those of every description; and there is not more authority in the courts, without the mandate of a statute, to depart from it in one, than in another case. While I own that I find no instance in which a verdict found by a jury that had separated has been held sufficient to authorize sen-
(510) tence of death, I must not, at the same time, omit to mention that my researches have been equally ineffectual for a case in which the conviction or acquittal of a person charged capitally has been set aside for that reason. We, however, do know that in many cases of that grade the trial has been adjourned over from one day to another, and the jurors allowed refreshments. Such was the course upon the trials of *Stone, Hardy* and *Tooke* for treason, 6 Term, 530, both with and without the consent of the prisoner; and also in *Burr's* trial; and this has been allowed in this State in *State v. Kimbrough,* 13 N. C., 431, as a matter of sound discretion. At first this was put upon the ground of necessity, arising out of the length of modern trials; and it was said that necessity justified what it compelled. But it is plain, that *necessity* is *not* used in its strict and absolute sense; for the departure of the Judge from the jury and place of trial was not unavoidable, and the jury might have slept and eaten in their box. It only means highly convenient to all concerned in the trial, and highly conducive to the purposes of justice, by enabling the Judge and jury to apply their faculties to the case before them. That kind of necessity must vary with each case; and therefore it was properly said by *Chief Justice Henderson,* "that it is *mere* matter of *discretion* in the Court, *convenient* and *necessary* for the exercise of its functions, in which the prisoner's consent has nothing to do." This is one marked departure from the text of the ancient common law, and is one evidence of the sense in which it is now to be understood, as applied to capital cases. It cannot be disputed, that this particular misconduct of departure does not vitiate verdicts in civil causes. It is so laid down by the best elementary writers, and there are numerous adjudged cases in support of it. The like is found on indictments for misdemeanors of the highest grade. How were those exceptions established? By force of the opinions of the Judges of the courts of the common

law, as to the true meaning of the rule originally, or as to the sense in which it ought to be received in the present state of society, so as to make it accord with other received modifications of the law. In the case of *Woolf, Kinnear and others* for a conspiracy, reported in 2 M. & S., 462, and better in 1 Chitty, 401, *Chief Justice Abbott* not only (511) adjourned the court over to next day, but without the knowledge of the accused, permitted the jury to disperse, and each one to spend the night at his own house, with a caution not to have any communication with any person concerning the trial. There not being any suggestion of such communications, a motion to set aside the verdict was made upon the simple and dry ground that it was null, by reason of the separation singly. The Court unanimously denied the motion, upon the ground that it was frequently practiced, and every instance of it was evidence of the lawfulness of it; and that it ought to be in the discretion of the Court. The Judges say explicitly, that consent ought and could make no difference, for the accused is not free to deny, and ought not therefore to be asked; nor did the leave of the Court justify or give authority to the jury, except as it prevented the act from being a contempt; for the Judge's order could not make that lawful which was in itself unlawful. These reasons seem to me to have the utmost weight, and to bring the question down to the single point, whether the rule is now to be considered as a positive, rigorous, inviolable mandate of the law, never to be departed from under any circumstances, or as one to be generally observed, as conducive to expedition in business, and to the fairness of trials; but which admits of exceptions, to be addressed to the discretion of the Court, as grounds for a new trial, if there be a suspicion that the jury has been tampered with, or that there was opportunity for it. To the whole Court the latter appeared the better interpretation of the principle. That, it is true, was a case of misdemeanor; but the principle seems to me to be the same. *Mr. Justice Best,* too, puts the case of a capital felony as one to which the application of the rule, in its literal acceptation would be most alarming; so much so, as to convince him that such could not be the rule. He says, "if the argument is right, it is right to this extent—that if, by any accident, a juror gets out of the box

for a single minute, it is a *mistrial.* Let us see the extent to which this doctrine may be carried. Suppose, in (512) the case of a *trial for capital felony*, some of the jury, by accident, get out of the box, and the prisoner, in the result of the trial, be acquitted, the consequence of this argument would be that it was a mistrial, and the man must be put on his trial again"; which he deemed, as well he might, too mischievous to be sanctioned as law. It is clear that is to be the effect of the doctrine, if established. To my mind, the safety, liberty and life of the citizen, who may happen to be accused, stand opposed to it. I do not here, more than I did on the preceding point, contend, that there may not be flagrant cases of misconduct during the separation of the jury, which ought to annul their verdict; and for which, if stated in the record, this Court, as a revising tribunal, might be bound so to do. But the inquiry is, whether every—the least separation—one for two minutes, as here, and next, for one minute or one second, is to have that effect. To me it seems clear, that the interests of the public and of the accused, alike require that we should take the rule as we find it in My Lord Hale's time, as it has been known in use and daily practice in England and in this State for many years past, rather than in the obdurate sense imported by its terms, as we first find it expressed. It is worthy of remark, that at that time there were no means in the discretion of the Court, for correcting the wilfulness or the mistakes of jurors. Attaints and the doctrine of mistrials, furnished the only method of redress. It might be much better to lay down as a positive and unqualified text, that acts, which tended to false verdicts, should vitiate all into which they entered, rather than allow those which were, in fact, unjust, through the corruption of the jury, to be obligatory. The more modern practice of granting new trials affords a readier, easier and more just method of redress; which renders the ancient rigor both unnecessary and highly inconvenient; not that jurors ought not still to be kept together, and refrain from intoxicating liquors, or that the Court should not, in all cases, observe those precautions against the jurors being tampered with, and especially in criminal cases, and, above all, in capital felonies; but when such irregularities do occur notwithstanding every precau-

tion, the Court now has power, not only of punishing (513) the jurors, but of visiting upon the parties all such consequences from the acts as they appear to the Court to have produced. If the party cause the irregularity, policy requires that a verdict in his favor, however right, should be forfeited. But if the party had no agency in it, there appears little reason for depriving him of his verdict, if proper upon the evidence and upon the law in the opinion of the Court, merely upon the ground that a juror had, without his privity, misbehaved. I have but little doubt that this power of the Court over verdicts in misdemeanors and in suits between man and man was the real, though perhaps at the time, the imperceptible cause of the first relaxations in cases of that description. It seems to me to have been a satisfactory and sufficient ground for such a relaxation, if indeed the rule was ever literally received. That it never was, or at any rate has not been for centuries past even in criminal cases, we also learn from 2 Hale Pl. Cr., 296, who states a case where, upon not guilty, there was a jury, one of whom, after their departure out of Court, left his companions; which being discovered by the Court, another juror was sworn in the place of A. He afterwards returned, and being examined by the Court, stated that he went to drink, and had not spoken with the defendant; whereupon his substitute was discharged, and the verdict of A and the other eleven was taken, though he was fined for his contempt. For this the Year-book of 34 Ed. III., is cited; which certainly carries us back to a very remote period, almost coeval with the rule in its origin. The case is not stated to have been one of felony; but the contrary does not appear, and if there had been a distinction, that humane and eminent Judge would not have omitted all notice of it. In this country there is some diversity of opinion upon the effect of a separation of the jury. In every State we believe it is held that it does not, *per se,* vacate a verdict, in civil actions; and as far as we have had access to the reports, in all, except Virginia, the rule is the same in inferior crimes. In that State it was held by a majority of the General Court in *Commonwealth v. McCarl,* Virginia Cases, 271, that a separation was fatal to a verdict in grand larceny. The cases in (514)

the other States are collected, and well arranged by the reporter, in a note to the case of *Smith v. Thompson,* 1 Cowen, 221. To them may be added *State v. Carstarphen,* 3 N. C., 238, in this State. That, it is true, was an indictment for perjury, and was a decision of a District Court only, but the doctrine has been received, and frequently acted on since; and I must again ask, by what authority the law can be modified in one case more than in another. Lord Coke, from whom the text is received, states it with no such modifications; and if they are admissible for the purpose of convenience and aid in the administration of justice in one class of cases, they seem to be equally proper in every other, to which the same reasons apply. In the case of *People v. Douglas,* 4 Cowen, 26, the doctrine deemed correct by me, is recognized by the Supreme Court of New York, as applicable to trials for capital felonies, and *Mr. Justice Woodworth,* after a review of all the cases, both English and American, adopts the conclusion without hesitation. To the objection that it leaves too much to the discretion of the Judge, I can only reply, that much as every Judge must regret the exercise of discretionary powers, many equally important with this, are possessed by courts, and it is indispensable that they should be so possessed. It is better that the one in question should be so entrusted, than the verdicts should be absolutely null. If it be a discretion not to set aside a verdict of *guilty* for this misconduct, when it has not in the judgment of the Court influenced the verdict, it is equally a discretion to let a verdict of not guilty stand under like circumstances. If I am not greatly mistaken in the supposition I have ventured to suggest, as to the causes of the extreme strictness with which juries were in ancient times watched and *imprisoned,* and of the motives for not continuing it, furnished by the increased facilities of doing justice by milder means through new trials, there is in this State, whatever may be the case in England, full scope for the exercise of a sound discretion on this subject as in others, through the power expressly given by the statute, to grant new trials in capital convictions. As in other cases, the miscon-
(515) duct of jurors is addressed to the courts, on a motion for a new trial, and not as constituting a mistrial, why may it not be in this case also? The objection is that

it will then rest in discretion. Not so when facts are stated in the record which show that the jury was unduly influenced, or make a case of probable cause for suspicion. To be sure the Judge sitting, must weigh the evidence of those facts, and it rests with him to set them down in the record; but we may safely trust to the integrity of the Judge to tell the truth, though we are forbidden to place a blind confidence in the correctness of his judgment as to the law. In cases which fall short of raising a suspicion in every reasonable mind that the verdict has been, or may have been produced by some undue influence, I think it safe to leave it to the discretion of the Judge, to throw in slight acts of irregularity in the jury, with other things, to show that the verdict is probably wrong, or is not, at least, manifestly right, and on that account to set aside the verdict by ordering a new trial. That this ought not to apply to a capital case I will admit, if there were any other safe or practicable way open to us. But I never can agree that a verdict of acquittal should be avoided for two minutes absence of a juror, which is to follow if this verdict of guilty be avoided. Besides, this discretion of granting a new trial in capital cases already exists. Tremendous as it is, and as it is felt to be by every Judge, it has been against their wills, and after repeated refusals of themselves to assume it, imposed on them by legislative authority. It is true, it is only to grant new trials to the accused; but it must ever be remembered, that a discretion to grant, is also a discretion to refuse; which puts the life of every convict in the hands and at the will of the Judge. I am not alarmed that it should be so to that extent. To all practical purposes and to the ends of justice and humanity, it has heretofore been carried discreetly, and exercised honestly. Unless it shall be abused the Legislature will have no motive for recalling it, or restricting it, and until that body shall see reason to do so, this Court, I think, ought not, and cannot. (516)

I am therefore of opinion, that judgment of death ought, in law, to be pronounced upon the verdict, against the prisoner, and that the same be accordingly certified to the Superior Court of Wake.

DANIEL, J., concurred with the Chief Justice.

GASTON, J., dissented, and delivered the following opinion: I concur with the other members of the Court in the opinion that the error assigned in this case, for that the presiding Judge expressed or intimated an opinion to the jury upon the facts, is not sustained. The reasons stated by my brother *Ruffin* for overruling this objection, are so entirely satisfactory that I have no wish to add a word to them. I am also of opinion that the irregularities of the trial, urged as a reason for setting aside the verdict and granting a new trial, were addressed to the discretion of the presiding Judge, and that as a court of errors we have no jurisdiction to review the exercise of that discretion. But I do not concur with my brethren in the opinion that judgment of death has been rightfully awarded against the prisoner, because it seemeth to me, upon the record, that his guilt has not been ascertained by a trial in due course of law. A verdict of guilty has been indeed received, and entered of record, but that verdict is so vitiated by the irregularities of the trial, also apparent on the record, as to render it in law *bad*. It is my opinion, therefore, that the Court below should be directed to vacate this verdict, and award a *venire de novo*.

To uphold the purity and efficiency of trial by jury, the law has prescribed certain regulations by which it shall be conducted. And the law would be unfaithful to itself, if it did not take effectual means to insure the observance of its mandates. For this purpose, it of course renders amenable to punishment all who violate these injunctions. But this vindictive sanction, although it may deter from violations of right, affords no redress to those who may, nevertheless, have been wronged. The law, therefore, requires of its ministers, whose duty it is to pronounce sentence upon (517) the matter set forth in the record, to see whether the disputed facts have been found in the mode which it authorizes, and with the observances of the solemnities which it commands. If this be not so, and an injury *may* thereby have been sustained by him against whom judgment is prayed, the judgment cannot be pronounced, but it must be suspended until the facts be legally ascertained. Should it appear on an inspection of the record, that the jury consisted of eleven instead of twelve persons—that the jury were not of the proper vicinage, or were returned by a wrong offi-

cer—that some of the jurors were not sworn—that proper challenges were refused—that in a capital case the jury had rendered a verdict against the prisoner secretly, or in his absence—that after the jury were sworn, either party delivered in a piece of evidence to the jury, and the verdict was given for him that delivered it—and that after the jury were sworn and gone from the box, they sent for a witness to repeat his evidence which he had before given openly in court—in these, and in all cases like these, there cannot be judgment, but the verdict must be set aside and another trial awarded. See *Arundel's case,* 6 Rep., 14; Co. Lit., 125, *a; Hassel v. Payne,* Cro. Eliz., 256; *Norman v. Benmont,* Willes, 484; *Wray v. Thorn,* Dev., 484; 2 Hale Pleas Crown, 306, 307. Such of these matters as may be termed *extrinsic* in their nature, but which, nevertheless, affect the legality of the trial, are to be made appear to the Court before whom the trial is had, and are there indorsed on the *postea,* or otherwise entered on the record. 2 Hale, *ut supra.*

There is a marked distinction between the awarding of a new venire because of the verdict being thus declared bad, and the setting of a verdict aside, and granting of a new trial. The former must be for matters apparent only on the record and is of *right.* The other may be for matter not appearing on the record and is addressed to the discretion of the Court. The former is matter of error, and must be noticed by the appellate court; the latter is ordinarily not matter of error, nor elsewhere examinable. The former is the ancient common law proceeding, the latter is comparatively of modern invention. See explanation of *Chief* (518) *Justice Willis* in *Wytham v. Lewis,* 1 Wilson, 55. See also, 2 Hawkins, ch. 47, sec. 12; 1 Chitty, 654.

The irregularities of the trial in this case are thus stated: "After the evidence was closed on both sides some of the jury desired leave to retire, and the Judge (without any objection being made by the prisoner or his counsel), put the whole jury in charge of the sheriff and permitted them to retire together; the jury accordingly retired out of the court-house, in charge and custody of the sheriff. A few minutes afterwards the sheriff returned into the court-house *with eleven of the jury only.* Thereupon the clerk was directed

to call over the names of the jury, when Henry Gorman, the juror whose name was third on the list, did not answer, but in less than two minutes he returned into the court-house, when the Judge expressed strong disapprobation at the juror's conduct; but upon the juror *stating* that he was obliged to step aside to obey the call of nature, and some of the by-standers testifying that the juror was a good, well-meaning man, and would not knowingly on any consideration have violated any rule of law or of the Court, no punishment was inflicted by the Court. The jury then took their seats in the jury box, and the trial proceeded, without any objection on the part of the prisoner, or his counsel. After argument, the motion for a new trial was overruled. The prisoner's counsel then offered to prove that while the juror, Henry Gorman, was absent from the body of the jury, he visited the store of W. J. Lougee & Co. to get a drink of spirits, which stands at the distance of one hundred, or one hundred and twenty-five yards from the court-house, and in view of it, which the Court refused to receive. The place to which the absent juror went was about seventy or eighty yards from the court-house, but out of the way, and retired.

It is much to be regretted, that his Honor had not received the proofs offered, and after instituting a full inquiry, caused the precise facts as they might thereon have appeared, to be distinctly put upon record. No one who knows him (519) can for a moment suspect that he intended to deprive the prisoner of the slightest privilege to which he was entitled, or shut him out from any objection which he could urge against the awful sentence about to be pronounced. Individually, I cannot doubt but that he declined to receive the offered *proofs,* because he considered the fact to be established by them immaterial. Individually, I have little or no doubt of the existence of that fact, but officially I can notice nothing *extrinsic* that occurred in the trial as a fact, but what is put on the record as such. I could not even examine the proofs, if the Judge had caused them to be annexed to the record, in order to determine the actual fact. I am bound also to throw out of consideration all that the delinquent juror stated, or his friend declared, to save him from censure. These answered the purpose of screening him from probably well-merited punishment, but it does not follow

that they were *true,* and the record does not *find* them to be true. No inquiry was made below, how long before the return of the jury into Court, the delinquent juror left his fellows. Their return did but make manifest to the Court the fact of a separation which had previously occurred. Confining, therefore, my attention strictly to the facts as stated, they are these: After all the evidence was received, one of the jurors, without permission, went away from the body of the jury, unattended by any officer. How long he was absent is unknown, except that his absence did not exceed a "few minutes," and two minutes thereafter. The place to which he went, the cause of his going off, the manner in which he conducted himself when away, are also unknown, He returned, and with his fellow jurors, rendered a verdict of guilty against the prisoner. The question of law, then, is simply this—does an unauthorized and *unexplained* dispersion of the jury, in a case of life and death, after the evidence is received, vitiate a verdict against the prisoner? Is such a verdict bad in law?

Had this verdict occurred forty years ago, about the period when my attention was first directed to legal studies and legal proceedings, I believe that it would have admitted of very little dispute. The verdict would have been set aside as unquestionably bad. Adjudications, however, (520) in England and in our sister States, have since been made, indicating less rigid opinions in relation to the forms of jury trials. These and other causes have concurred to render this question now one of serious difficulty, and impose on me the necessity of re-examining the correctness of the notion which formerly prevailed.

The law of North Carolina is the common and statute law of England, as it existed before the Revolution, and has been since modified by State legislation.

It was once the unquestioned law of England, that such a separation of the jury in any case, civil or criminal, vitiated the verdict. My Lord Coke lays it down as a fundamental rule, that "by *the law of England,* a jury, after the evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle (which some call an imprisonment), without speech to any one, unless it be the bailiff, and with him only if they be

agreed." Co. Litt., 227. The *severities* of this confinement might be mitigated by an order of Court.

The jury might eat and drink in view of the Judge, by order of the Court, says Baron Comyns, title *Pleader,* Verdict, sec. 46, and for this he quotes the Year-book, 20 Hen. VII., 3 p. It is laid down in Doctor and Student, dialogue 2, ch. 52, p. 270, "with the assent of the Justices, they may both eat and drink." This part of the rule being intended to guard rather against delay than corruption, was always regarded as not absolutely inflexible, but one which, under the supervision of the Court, might be accommodated to the circumstances of each case. If any of the jury, however, without the license of the Court, ate or drank before the verdict was delivered, it was once held that this irregularity vitiated the verdict. But a distinction soon after was taken and recognized as valid; if the jury ate or drank at their own charges or at the charges of him against whom they found, although they were liable to punishment, this misconduct did not avoid the verdict. 2 Hale Pl. C., 42. The reason for this distinction is stated in *Rogers v. Smith,* Palmer,
(521) 380, that the misconduct of the juror should be punished, whether it affected the verdict or not, but that it ought not to vacate the verdict, unless it was of that kind which cast a suspicion thereon. But the first great purpose of this rule, the securing of the jury from the possibility of improper intercourse, forbade all dispensation from that part of it which required confinement. The law had with great pains endeavored to procure for triers men above all exceptions, who stood indifferent, as they stood unsworn; and with yet more jealous care provided, that they should hear no evidence but what was relevant to the precise matter in controversy, and fit to bring their understandings and consciences to a proper conclusion thereon. If after all these precautionary measures, it permitted the triers to mix with those around them, to catch the partialities and prejudices of the friends and enemies to the parties, and to open their ears to all that might be *said* in relation to the matter under trial, the precautions were nugatory and there was no security for an impartial verdict founded upon the evidence. This part of the rule, as it admitted of no dispensation, so it permitted no exception, unless it were such as was produced by

imperious necessity, and even this was not allowed without great hesitation and against the opinion of many of the sages of the law. Brooke's Abr. Verdict, pl. 19 (of which a correct translation is given in a note, 1 Cow., 252), states a case between the Bishop of L. and the Earl of Kent, upon the trial of which the jury, after being dispersed by a violent storm, reassembled and returned a verdict. It was finally held, after great debate and much difference of opinion, that because of the necessity there was no breach of the rule, and the verdict was good. That a separation not caused by necessity vitiates the verdict appears from the same author (Verdict, pl. 17) to have been adjudged in a case of replevin. See also 21 Viner Trial, ctg. 451, pl. 21. This case so distinctly presents the manner of proceeding upon those irregularities which are not only visited with punishment, but which do away the finding, that it merits attentive consideration. "*Nisi prius,* in replevin, in Essex, the jury was sworn and committed to the ward of the sheriff, and when (522) the justice would have taken the verdict it was deposed to them by people that meat and drink was brought to them after their charge, and that they were suffered to go at large, by which the justices refused to receive their verdict because it was suspicious; and of this matter complaint was made to the king by bill, who enclosed it to the Justices of B. R. to do right and reason. And the under-sheriff, by his servant, confessed that he permitted them to go at large; and because it appeared of record, viz., *his* misdemeanor, and he is an officer, a *capias* was awarded against him; and because the going at large and taking of meat and drink is only surmised, therefore a *venire* (a summons) was awarded against the jury and the transgressors, and between the parties a new *venire facias* was awarded to return twelve," etc.

In no report of an adjudged case until the period which shall be hereafter mentioned, in no elementary law writer of acknowledged authority can I find either decision or *dictum* which permits of a further exception. Universal, but in this instance bending to no power but that which all must submit to, it must be taken as one which the law deems essential to the impartial administration of justice. If no Judge can dispense with it, certainly no Judge can pronounce the violation of it immaterial. The law forbids it in all cases, be-

cause it tends to destroy the purity of jury trials. A verdict taken in defiance of this prohibition is necessarily, therefore, regarded as "suspicious," and unless this suspicion be entirely removed, the verdict seems to me necessarily bad. It cannot be doubted that, whatever might be the rule, more or less rigid, which prevailed for securing verdicts from this taint of suspicion, it was upheld with much greater jealousy in criminal, and especially in capital, than in civil cases. In the latter many of the forms of law might be waived, but in the former the prisoner was understood to waive none to which he had a right. His life was at stake. It was put in charge of the jury, and they were to make true deliverance, in respect thereof, between him and the king. In a capital case there could be no new trial. The verdict of the jury, rendered in due form of law, whether for or against the (523) prisoner, was conclusive as to the claim of the offended sovereign to the life of his subject. In a civil case there might be a nonsuit; in a criminal case the jury, once charged, could not be discharged. In a civil case and in misdemeanors the indulgence of a privy verdict was allowed to the jury, but in a capital case they were bound to look on the prisoner when they pronounced on his deliverance and freed themselves from their weighty charge. Time, which is a great innovator, and the fashion of this world, which, as it passeth away, leaves not infrequently lasting changes behind it, may perhaps have produced some modifications and alterations in the old rule. I can find, however, no traces of any further alterations or modifications of the rule ever sanctioned by the courts in a capital case. The separation was never allowed, as far as I can see, in any capital case, unless necessity required it; and if so, it must follow, I think, that if it took place against permission, *prima facie,* it avoided the verdict. The rule as laid down in *Lord Delamere's case,* 4 Hargrave State Trials, 232, was invariably adhered to, and, as far as I can learn, is inflexibly adhered to *unto this day.* There, on a question whether the court *can allow* the jury to separate, it was said by all the Judges, the jury being once charged, can never be discharged. This is clear, and the reason for that is for fear of corrupting and tampering with the jury. An officer is sworn to keep the jury, without permitting them to separate or any one to converse with them;

for no man knows what happens; for, though the law requires honest men should be returned upon juries, and without a known objection they are presumed to be *probi et legales homines*, yet they are weak men and perhaps may be wrought on by undue applications. So, my Lord Coke, commenting (3 Institutes, ch. 2, sec. 15, p. 307) on the trial of peers before the Lord High Steward, says: "The peers ought to continue together *as jurors in case, as other subjects do,* until they be agreed of their verdict." In civil cases, and perhaps in inferior misdemeanors, it seems to have been early held that the parties might, by consent, waive such irregularities if they were not attended, and shown not to be attended, by abuse. Thus it is laid down by my Lord (524) Hale (2 Hale P. C., 296): "Upon not guilty pleaded, twelve are sworn to try the issue. After their departure, one of the twelve leaves his companions, which, being discovered by the Court, by consent of all parties, B, another of the panel, is sworn in the place of A, and afterwards A returns to his company, which being made known to the Court, A is called and examined why he departed; he answered, 'To drink,' and *being examined whether he had spoken with the defendant, denied it upon his oath;* whereupon B was discharged from giving any verdict, and the verdict taken of A and the other eleven, and A fined for his contempt." For this he cites 34 Ed. III., *Office de Court,* in trespass. I have not the means of access to the authority which he quotes. It must be understood to have been a case of trespass by which a capital offense would not have been designated. The defendant no doubt desired the absent juror to be reunited with his fellows, for the Court required of him to be sworn that he had not spoken *with the defendant*, and it does not appear to have been objected to on the adverse side. The consent spoken, I understand, therefore, as having extended to all the occurrences on the trial, and the oath of the offending juror removed the suspicion of all tampering and improper communications. Whatever may be the exception which this case seems to make out of the general rule (and, without violence, it can scarcely be said to extend further than I have supposed), it was not regarded by Lord Hale as more than an exception to an established rule, for in the very same page he subjoins that "where the jurors depart

from the bar a bailiff ought to be sworn to keep them together and not to suffer any to speak with them." The only case in the English books, before our Revolution, which I have met with, where a separation, not appearing to be by consent, nor justified by necessity, nor shown to be certainly unattended by abuse, is said even in a civil case to uphold a verdict, is that of *Lord St. John v. Abbot,* reported as of Michaelmas Term, 9 Geo. II., and to be found in Barnes's notes, 324. How much reliance is to be placed on this short note of a very inaccurate reporter it is not necessary now to (525) decide, although for my part I have no hesitation in declaring that I would require far more to authorize me in sanctioning any innovation upon previously well settled law. I have far more respect for the opinion expressed by a great American Judge (the late *Mr. Justice Livingston* of the Supreme Court of the United States) and reported in the case of *Leister v. Stanly,* 3 Day, 287. This cause was tried in the Circuit Court of the United States for the District of Connecticut, where the jurors, by long usage (denied a part of the common law of that State) are permitted to go at large. After the case had been committed to the jury, *Livingston, J.*, remarked that he understood it had sometimes been the practice with jurors in Connecticut to separate while they had a case under consideration. He then proceeds thus: "The rule of the common law requires them to be kept together until they have agreed on their verdict; and on looking at the statute we do not perceive that *that* varies it. If they separate before, and afterwards return a verdict, it will be set aside." It is true that in Connecticut this peculiar practice has been at length sanctioned (see case of *Brandin v. Grannis,* 1 Con. N. S., n. a.), but it is explicitly settled because of the long-established usage in that State, and it is admitted to be not in conformity with the rule of the common law. There has been no adjudication in North Carolina, that I am informed of, which holds such a verdict good. The case of *State v. Carstarphen,* 3 N. C., 238, was quoted at the bar as an authority for that purpose. The note is a loose one, and, like many others in that volume, is somewhat inaccurate. My brother *Daniel,* who was present at the trial, mentions one fact not noticed by the reporter—that the absence of the two jurors was from necessity. Upon the

admitted *fact* of this necessity, and on proof that the jurors had no intercourse with any persons, *Judge Hall* said the verdict ought not to be set aside, and the motion to do so was not pressed. Without such necessity and such proof, it seems that the verdict would have been deemed invalid. Is this authority? I recognize it as such, and to its full extent I am willing to go in all cases, civil and criminal. But I want authority, for I cannot find principles to jus- (526) tify me in holding a verdict good although the jury have gone at large and the irregularity is not found or admitted to have been produced by necessity, or to have been attended by no abuse. So far as I have proceeded in this examination I see no cause to doubt but that in a case of life and death an unlicensed and unexplained separation of the jury does, in our law, vitiate a verdict against a prisoner (as unquestionably it once did in the country of our ancestors). One of the duties of Judges is to hand down the deposit of the law as they have received it, without addition, diminution or change. It is a duty the faithful performance of which is exceedingly difficult. They must refrain from all tempting novelties, listen to no suggestion of expediency, give in to no plausible theories, and submit to be deemed old-fashioned and bigoted formalists, when all around are running on in the supposed career of liberal improvement. But perhaps there are few duties in which they can so effectually serve the State. A pause is thus created for thought amid the hurry of action. Stability is given to the public institutions, and, above all, there is that recurrence to fundamental principles which is enjoined in our Constitution and is essential for the preservation of liberty and order.

Questions connected with and thought to bear upon that now under consideration have been examined and decided in England since our Revolution and recently in our sister States. These decisions are well worthy of attention, not, however, as in the nature of authorities, but as furnishing evidence of what learned and wise men have deemed to be the common law of our country, as well as of theirs. The case of *The King v. Kinnear*, 4 Bar. & Ald., 462, or *The King v. Wolfe*, as it is entitled, 1 Chitty, 401 (18 E. C. L., 115), is relied on with great emphasis by the State to show that the

irregularity which confessedly existed in the present case does not avoid the verdict. It is impossible for any person acquainted with the great talent and probity which adorn the high judicial tribunals of England to regard any of their deliberate decisions otherwise than with respect. I (527) have attentively examined this case, so greatly relied on, but the result of that examination has been, not to shake but to confirm the opinion which my other researches had produced. It was the case of a misdemeanor. The trial having commenced in the morning and continued until a late hour in the night, before the evidence even for the prosecution had closed it became a matter of necessity that the trial should be adjourned, and by order of the Court it was so adjourned. The jurors were permitted to retire to their families after an address from the Chief Justice warning them to have no communication with any persons touching or concerning the matter in issue. The defendants were convicted. There was no allegation that this warning had been violated, or of any other misconduct in the jury. It was moved to stay the judgment and set aside the verdict because of this separation ordered by the Court. The motion was refused, but let us see upon what grounds. The very *first* is, that the offense charged was a misdemeanor and not a capital crime. *Chief Justice Abbott*, confessedly a profound lawyer, grounds himself upon this *alone*. After showing that there could be no legal objection merely because of an *adjournment*, he adds: "The adjournment is not necessarily followed by the dispersion of the jury; for in many cases (and in many cases they ought) they are kept together until the final close of the trial. But I am of opinion that in the case of a *misdemeanor* their dispersion does not vitiate the verdict, and I *found my opinion upon the admitted fact* that there are many instances of late years in which juries, upon trials for misdemeanors, have dispersed and gone to their abodes during the night for which the adjournment took place; and I consider every instance in which that has been done to be proof that it has been lawfully done." It is not for me to say whether the adjudication was correct or not, but the ground on which the adjudication was placed militates decidedly, in my opinion, against the purposes for which it is quoted. "There are cases in which a jury ought to be kept

together." Do we wish to know what are these? They are the cases in which, without exception, they are ordered to be kept together—cases of life and death. In the case of *Stone,* reported 6 Term, 527, and in those of (528) *Hardy, Tooke* and others, reported in State Trials, the jury were kept together, notwithstanding repeated adjournments. The law was as rigidly observed *in this respect* as it would have been in the days of my Lord Coke. The order, after reciting fully the cause which made some intermission in the trial necessary, proceeded thus: "It is ordered that the jury impaneled to try the said issue have leave to withdraw from the bar of this Court, *being well and truly kept* by six bailiffs, who shall be sworn not to permit any person to speak to them touching any matter relating to the trial of this issue, and that the jury shall again come to the bar," etc. "There are many instances of late years," proceeds the Chief Justice, "in which juries, on trials of misdemeanors, have dispersed and gone to their abodes during the night for which the adjournment took place, and every such instance I regard as proof that it may be lawfully done." But I believe that I may lay it down as an universal rule that there is *no* instance in England, either in ancient or modern times, in which such a dispersion is permitted on a trial for a capital offense, and for that very reason it follows that such a dispersion must yet be deemed *unlawful.* The Chief Justice having delivered this opinion upon consultation with his associates, I consider what is afterwards added by them as not constituting the *ground* of the judgment, but as deserving notice merely because it proceeds from learned men. *Justice Bayley* remarks that if a separation for a night will vacate a verdict, why may not one of two minutes? I confess that I can see no reason why it should not, if each appear to be unlawful and the possibility of improper communication be not *repelled.* He says "that it is in the experience of persons that the Judge, as well as the jury, is occasionally absent for a short period." It seems to me there is some confusion here. The question is not of a separation of the *Judge* from the jury—a separation which the law does not forbid, but of a separation of the jury from each other, which the law does forbid. *Mr. Justice Holroyd* places his opinion directly upon this ground: "I do not find

(529) any authority in law which says that the separation of a jury *in a case between party and party*, or in the case of *a misdemeanor*, does avoid the verdict." He adds, indeed, that a separation ought not to take place without the authority of the Court, and if during that separation the jury be guilty of improper conduct they may be fined for a contempt. *Mr. Justice Best*, after declaring himself of the same opinion with his associates, subjoins some remarks which I feel it incumbent on me to examine a little more particularly." "It is insisted," says the Judge, "that this is a misverdict, and that no legal verdict has been given. Now I am alarmed at the extent to which the proposition may be carried, for if this is a mistrial in consequence of the separation of the jury, then if by any *accident* a juryman gets *out of the bar* for a single minute it is a mistrial. Suppose, in the case of a trial for a capital felony, some of the jury by *accident get out of the bar* and the prisoner is acquitted, the consequence of this argument would be that it would be a mistrial and the man put on his trial again. That is a consequence which alarms me, and I do not feel that we should give *any countenance to an objection* that would go to such a mischievous extent." Whether the argument which the advocate of the prisoner there advanced could be pushed to the mischievous extent which so greatly alarmed the Judge, I am unable to say, but that the doctrine which I take to be the doctrine of the law ought not to excite this terror, I have a full conviction. The general rule is, that a separation avoids the verdict, but that it will not avoid it if caused by necessity and shown not to have been attended by misconduct. The Judge surely did not mean to be understood, *literally*, "if one of the jurors should happen to get out of the bar." The law has prescribed no place for the juror's confinement. The law considers him not separated from his fellows, although not in active contact with them, if he be yet under the eye of the Court or under the charge of its officers—kept from intercourse with the parties to the suit and others who, not acting under the same sanction which bound the consciences of his fellow-jurors, might be tempted to mis-

(530) lead and pervert him. But, again, what does the Judge mean by *accident?* If a casualty, proceeding from a natural cause, then it presents the acknowledged ex-

ception of necessity. But I think it not undeserving of consideration, whether within the principles of the rule under examination a separation of the jury, unless under *extraordinary* circumstances, can be alleged as a cause of mistrial on the part of the crown. No doubt, upon a mistrial the verdict, whether for the crown or the prisoner, will be set aside and a *venire de novo* awarded. But the same matter of fact cannot be indifferently argued on either side as cause for avoiding the verdict. If the jury be treated by one of the parties, the other may allege this as cause of mistrial, but he who has caused the irregularity certainly cannot. If the prisoner, by any subtle contrivance, produces the separation, and he is acquitted, and there was a possibility of tampering, there ought to be another trial; but if he is wholly guiltless of the separation it may be doubted whether the crown, which had the unquestioned ability to keep the jury together and would not, shall be admitted to urge that the dispersion was against its will. But, however this may be, the true answer to any possible case of oppression so dreaded by the Judge is, that none such in the history of English criminal trials has ever yet occurred, although it seems to be distinctly admitted by him that the law once was, as stated by all the Judges in England in *Lord Delamere's case,* that a jury, once charged, cannot be discharged. And if any alarm should yet remain it may be allayed by the consideration that if *courts* will not relax the rule by which the consequences of separation is to be a mistrial, it may be very confidently expected that a separation will scarcely ever occur unless when produced by necessity or when all parties desire it. The pointed differences between the cases quoted and that under consideration are, that was a case of misdemeanor; this of life and death. The separation *there* was lawful because ordered by the Court in a matter wherein numerous decisions had settled that such a separation could be rightfully ordered; here it was unlawful because not necessary, and in a case where the Court could not order it for any cause (531) short of necessity. A lawful separation, *per se,* induces no suspicion of improper intercourse with the jury. An unlawful separation does induce the suspicion, else whereupon is it forbidden? A lawful separation, inducing of itself no suspicion, must be shown to have been abused before it

shall affect the verdict. An unlawful separation must be entirely freed from the taint of suspicion before it can sustain the verdict.

The Attorney-General relies with much confidence on *People v. Douglas,* 4 Cowen, 26, as supporting the position that *the separation* does not, *per se,* vitiate the verdict. If that case is to be regarded as a *proper guide* to be followed, then it would seem that this verdict *ought to have been set aside.* If it is not to be followed throughout, it must be because it was incorrectly decided. It merits, therefore, a critical examination before we determine how far it is to be regarded as a safe, and where we shall guard against it as a fallacious, guide.

The prisoner had been found guilty of murder and the sentence respited, that the opinion of the Supreme Court might be had whether the verdict should be set aside. The objections taken to the verdict were: "That two of the jurors, while out under the care of the constables, separated from their fellows, ate, drank *whiskey,* put cakes into their pockets, and conversed with bystanders on the subject of the trial." One of these jurors had become insane and his affidavit could not be taken. The other denied that he drank *whiskey,* but did not add "nor any other spirituous liquor." He deposed that he did not converse on the subject of the trial, nor did he believe that the other juror (Lamb) conversed with any one; that he was in his company all the time, except that on his return he left Lamb standing at the door of the jail, where they got cakes, advanced five or six rods before him, turned and called to him, when Lamb immediately followed; and he stated circumstances which strongly negatived the charge that Lamb drank any spirituous liquor. The two jurors implicated were fully proved to be men of very fair characters, and were in nowise affected by any spirituous liquor which they might have drunk. *All* the wit-
(532) nesses who deposed against the conduct of the jurors were contradicted and discredited, with the exception of *one* only, who said, on oath, that he *thought* he saw them drink some spirituous liquor. The Court ordered the verdict to be set aside and the prisoner to be tried again.

The Judges delivered their opinions *seriatim.* They all agreed that the mere fact of separation, in a civil cause, un-

attended by other abuse, did not avoid the verdict. Assuming this to be the established law in civil cases, they nevertheless guarded against being understood to decide that it would not have this effect in a capital case. "We do not mean to be understood that the mere separation of the jury is not sufficient cause for setting aside a verdict," are the words which the reporter ascribes to *Mr. Justice Woodworth.* Perhaps there may be here a misprision of print and the word "not" should be expunged. But, if so, he at least means to say that they leave that point undetermined. "On so grave a question as that of the life and death of a fellow-citizen," says *Chief Justice Savage,* "I am not prepared to say that the separation of the jury, contrary to the instructions of the Court, and mingling with the throng about the court-house, should not affect their verdict." There can be no mistake as to the language. *Mr. Justice Sutherland* is not quite so definite. His language is: "I have no hesitation in saying that when the separation of a jury is contrary to their duty towards the Court, and there is the *slightest suspicion of abuse,* their verdict should be set aside." Two of the Justices think that the balance of evidence is, that two of the jurors, or one of them at least, did drink spirituous liquor of some kind. One of them thinks that the balance of evidence is against it. They speak of the great difficulty of laying down any general rule which shall apply to all cases under their various circumstances, but ultimately conclude by establishing as an inflexible rule that if the jurors drink spirituous liquors, or if, in a case of life and death, it be *doubtful* whether they may not have drunk some, then, without regard to the quantity or the effect produced, the verdict shall not be sustained. In the course of my anxious reflection on the case before us I have more than once examined (533) the case of *People v. Douglas,* and every review has convinced me more and more of the danger of being misled from the straight path of the *law* by the illusions of *opinion.* With sincere respect for the learned Judges who decided that case, I cannot but say that a legal mind can scarcely fail to discover a repugnancy between the premises on which they seem to reason and the conclusion to which they are conducted. If there be any *general rule* on this subject it *must* be a *rule of law.* A rule for the administration of justice

which is to be applied in every case, without regard to the *particular effect* produced thereby, can be nothing less than *law*. If there be no such rule, whence do the Judges derive the power of making one? If the application is to be regarded as addressed to their discretion, then each case must be judged of according to that discretion applied to its particular circumstance. Yet they ordain that any—the *least* quantity—of spirituous liquors taken by a juror shall not be tolerated in any shape, but shall vitiate every verdict, civil or criminal, even when given by consent of parties. And on what is this rule founded except that the use of spirituous liquors may lead to abuse? I have no difficulty in saying, with my brethren, that I can find no law to this effect, and where the law is silent I dare not make a rule by which all in the land are to be governed.

I do not disapprove of the judgment in *People v. Douglas,* because the law, which is wiser than any man, has, I think, already laid down the rule which perhaps justified the rendering of such a judgment. It has been shown, I think, that the common law would uphold no verdict rendered by a jury who had dispersed without a necessary cause, adjudged by the Court or appearing on the record, or, in cases short of capital, without permission of the parties, unless perhaps where the fact of improper communication is expressly negatived. This rule, venerable from its antiquity and once admitted to be of undoubted obligation, is founded on the very reasons which induced the Judges in New York to establish *their* rule, because such a separation necessarily leads to abuse, and it is impossible to ascertain in (534) each case whether *actual* abuse has followed or not. It is like the rule of evidence which prohibits all testimony from an interested witness, however small his interest. Many witnesses may be thus excluded who would testify truly, but it is impossible to discriminate in each case how far the bias of interest may tempt to the perversion of truth, and to prevent this perversion all such testimony is shut out. It is like the rule in equity which will not tolerate purchases of trustees from those having the beneficial estate, not because there is abuse, but because without the rule there will be abuses which cannot be detected and which ought not to be tolerated.

The difficulties in which these learned Judges were involved I regard as a warning how slight deviations from established rules should ever be permitted. It is manifest that their embarrassment lay in reconciling certain practices recently tolerated in their State with the law as it unquestionably once stood. It had been held in a civil case (*Smith v. Thompson,* 1 Cowen, 221), where some of the jurors had eluded the care of the constable and went off during the night, but returned to the body of the jury next morning, and where no improper communication actually appeared, that, as no *probability* of abuse was seen, they would not set aside the verdict, and this decision was grounded solely on a previous one of *Hackly v. Hastie,* 3 Johns., 252, in which the common-law strictness with respect to the jurors not taking out papers with them is supposed to have been somewhat relaxed. How easy is the descent, and how hard the return! The error was, that the Court would not see probability of abuse where the law saw it. Without reversing the case of *Smith v. Thompson,* they were obliged to hold that the common-law rule was done away with in civil cases, and, although not prepared to decide that it was abolished also in cases of life and death, they were perplexed with the question, why retain it in part and not altogether? And now, although they professedly abstain from carrying the innovation to such a dangerous length, their forbearing to *stem* it is argued as a reason why we should sanction the innovation far beyond what they would sanction. As yet we have no such (535) embarrassments; as yet we have adhered to the common-law rule in *all* cases, and I think there is nothing so inviting in the experience of those who have departed from it as should tempt us to follow on in their wanderings. But, with deference to the argument deduced for the State from the cases of *King v. Wolfe* and *People v. Douglas,* I think it inverts the legitimate order of reasoning. As all human institutions in the progress of time become more or less disordered, so every legal rule, however well defined and clearly established, will be more or less deformed by anomalies, which may gradually be so incorporated into the rule itself that they cannot be got rid of without violence. It may then be the part of wisdom to bear with them, but for their sake the rule itself is not to be destroyed. In jurisprudence, as

in logic, exceptions *prove* the rule. If the common-law maxim has been so disregarded in civil cases and in cases of misdemeanor that it is hopeless to enforce it any longer, and as to them we must abandon *law for discretion*, let us cherish it with the greater care on those important occasions in which as yet it has been preserved inviolate. As far, then, as I am able to discover, there is no adjudged case in North Carolina, or in England, or in any State of the Union, professing to be founded on the common law, which would uphold me in saying that the irregularities appearing upon this record, showing the possibility of improper communications, and the *fact* of such communications not negatived, can be disregarded. The irregularities are confessedly against law; they impress on the verdict the stamp of legal suspicion; that impression is not removed, and until it be removed the law will not found a judgment on what it reprobates and distrusts.

Such would be my conclusion if I were unsupported by any adjudged cases. But it is a great relief to me to find that I am not. I do not rely as confidently as Mr. Chitty seems to do (1 Chitty Crim. Law, 633) on the cases of *The King v. Fowler,* 4 Barn. & Ald., 273 (6 E. C. L., 273), although I think it not unworthy to be cited. The record there was of a conviction, in a case of *felony,* at the (536) Quarter Sessions, whereon the record set forth that, after a verdict of guilty, "because it appeared to the said Justices that after the evidence given on the trial of the said issue had been heard, and after the said jurors had departed from the Court in order to consider of the verdict to be by them given thereon, and before the delivery of the said verdict into Court, one C. O., a juror, did, without the permission of the said Justices, withdraw and separate himself from the rest of the jurors, and, being so separated, did hold conversation with one J. C., the said J. C. not being one of the said jurors of and concerning the said trial, and concerning the verdict then about to be given therein, therefore it was considered that the verdict given in this behalf was bad and erroneous, and the same was quashed by the judgment of the said Justices, therefore let a new jury come before the Justices," etc. This is, indeed, a decision by a respectable court—that for the matters therein appearing the verdict is bad; and, on being carried before the Court of King's Bench,

by error, the decision was not disapproved, but neither was it directly sanctioned. The prisoner having been convicted on the second trial, and judgment being thereon rendered, that Court held that there was no error, for the first verdict was either good or bad; if good, *that* verdict supported the judgment, and if bad, then the first was a mistrial and a nullity, and the second verdict supported the judgment. Besides, there is a difference between the case referred to and the present; that states an actual conversation of the delinquent juror with a stranger on the subject of the trial, while this leaves the separation open only to the suspicion of such improper communications. But there are decisions of high respectability fully in point.

The case of *Commonwealth v. John McCawl,* decided in the General Court of Virginia (Virginia Cases, 271), and of which a note is to be found in 1 Cow., 235, is unquestionably such an one. The prisoner was indicted for grand larceny. The trial continued four days, on each of which the Court adjourned for about two hours, giving orders that in the meantime the jury should be kept together in a room by themselves, where they were allowed refreshments.
On their way to the jury room, at the second adjourn- (537)
ment, one of the jurors, having been unexpectedly
sworn on the jury, separated from his fellows about twenty minutes, unattended by any officer. He ate his dinner at his boarding-house and returned. Several persons asked him if the trial of McCawl was over, to which he answered that it was not; but he had, as he stated, no further conversation with any one on the subject—denied that he had been practiced with, and no abuse appeared. Another was absent a few minutes on a visit to his sick child (this was in the morning of the second day), with an officer, from whom he was separated about five minutes on going into the room to see his child. Verdict of guilty.

On motion to set aside this verdict, a majority of the Court held that it must be set aside; that actual tampering with a juryman was *not necessary to be shown;* that the old rule was, that the jury on no occasion should separate; that this rule is relaxed only in cases of imperious or perhaps unavoidable necessity; that by allowing a verdict to stand when a jury had separated without necessity, unless the prisoner,

who is in custody of the law, shall show actual tampering or communication with the jury, this great barrier against oppression may be gradually sapped and undermined; that if the Court had, without necessity, allowed a juryman to go home without an officer, that would vitiate the verdict; that in a free country the decision should be on general principles, and that more good would arise from observing the sacred principle involved in the case than evil from granting a new trial, although in this individual instance a verdict had probably been given by twelve men, in fact, unbiased by the separation. The verdict was pronounced bad and a new *venire* ordered. Whether the Court, which, it seems, had a right to examine the *evidence* as to the separation, might not in this case have come to the conclusion as a fact that it proved there had been no improper communication, and upon that fact so established have upheld the verdict, may admit of a difference of opinion. But, supposing that fact not established, the reasons assigned for this decision (which I have weak-
(538) ened by abridging) are, to me, so conclusive that I content myself by declaring my entire assent to them.

In *People v. McKay*, 18 Johns., 212, where the judgment was arrested and an *alias venire* ordered because the *venire* on which the jury had been returned was not under seal, *Chief Justice Spencer* notices a doubt expressed by the prisoner's counsel whether arresting the judgment does not entitle the prisoner to be discharged without being subjected to another trial. After showing that this will not be the case, he adds: "A case analogous in principle occurred in Ontario County in 1814. A woman of color was indicted and tried for murder and found guilty. The jury had separated *after agreeing on a verdict* and before they came into court, and on that ground a new trial was granted and she was tried again." Here the separation was after the verdict was agreed upon, which almost excludes the possibility of tampering. But, nevertheless, the verdict was not allowed to stand, because, I presume, the fact of tampering was not actually negatived thereby. To these decisions let me add some very striking observations of *Chief Justice Shaw*, in *Commonwealth v. Roby*, 12 Pick., 519, which seem to me strongly to support these conclusions. He quotes the case of *McCawl*, and then, referring to that of *Douglas*, observes "that the

Court in New York intimated that this (the decision in *McCawl's case*) went somewhat further than the common law. Whether it would be adopted as the rule here it is not necessary to inquire. It is *manifest* that by such separation the jurors might be thus exposed." Towards the conclusion of his very able opinion he adds this remark: "The result of the authorities is, that where there is any irregularity which may affect the *impartiality of the proceedings,* as when meat and drink have been furnished by a party, or where the jury have been exposed to the effect of such influence, as *where they have improperly separated themselves* or have had communications not authorized, then, inasmuch as there can be *no certainty that the verdict has not been improperly influenced,* the proper and appropriate mode of correction and relief is by *undoing* what is thus improperly and *may* (539) be corruptly done; or where the irregularity consists in doing that which may disqualify the jurors for proper deliberation and exercise of their reason and judgment, as where ardent spirits are introduced, there it *would be proper to set aside* the verdict, because no reliance can be placed on its purity and correctness." If I do not greatly misapprehend the meaning of these, as I think, most perspicuous observations, the *true* distinction is taken which seems to have been overlooked by the Court in *People v. Douglas.* For a breach of those positive rules which the law has established in order to secure a fair, unbiased and impartial trial—among which breaches is an improper separation of the jury—the law furnishes a remedy by *undoing* what has been unlawfully and may have been corruptly done. It annuls and vacates the verdict. As to the mischiefs which result from misconduct of jurors, short of a breach of those positive regulations made to secure the purity of trial by jury and not appearing to warrant a suspicion of unfairness, the proper remedy to be had is by a new trial. The latter is necessarily a matter of discretion, but the former is a matter of law.

It is scarcely necessary to remark that the prisoner is not precluded from insisting on the law because he did not object to the juror resuming his place among his fellow-jurors. Whatever might be the effect of this implied assent in a civil case, in a criminal case, and especially in one where life is at hazard, the prisoner is to be considered as standing upon

all his rights and waiving nothing on the score of irregularity. In the view which I am obliged to take of this case, the *time* of the juror's absence cannot affect my judgment. As matter of evidence to the Court below, upon an inquiry whether there had been any improper communication, it would have been a material circumstance. The facilities for improper intercourse may have depended much on the length of the period during which the juror was suffered to go at large; but unless the time be so spent that I can judicially say that such intercourse was *impossible,* I must adhere to the rule which holds an unexplained separation suspicious.

(540) I see no alternative between a steady adherence to the law which vitiates a *suspected verdict,* or leaving the question of its *validity* or *invalidity* to depend on the discretion of the presiding Judge. To the adoption of the latter branch of the alternative I have insuperable objections. It would be oppressive to the Judge, dangerous to the community and at variance with the settled principles of our law. It is impossible, indeed, not to confide discretion to judicial magistrates; but I am sure that, while every enlightened friend to free government holds unnecessary discretion to be tyranny, every conscientious Judge will say that of all his duties none are so distressing as those wherein he can find no certain rule, but is left to his own notions of fitness and expediency. It was remarked by *Lord Eldon* that he had often far less difficulty in deciding on the merits of a difficult chancery suit than in determining on the question of costs, because costs in that Court are a matter of discretion. As the exercise of this discretion could not be re-examined, there would be no uniformity of decision. One Judge who had old-fashioned notions would suspect every verdict which the former law of the land held to be suspicious; another less rigid would not indulge this suspicion unless there was matter shown indicating *probable abuse:* while a third, yet further advanced in liberal notions, would suspect none until abuse actually shown. Some would require the jurors to be examined on oath, while others might deem them incompetent on a question as to their own misconduct. *Optima est lex quæ minimum relinquet arbitrio judicis, optimus judex qui minimum sibi.* The grant of such a discretionary power would be repugnant (so, at least, I

think) to the principles of our institutions. When they give a discretion, it is usually, and always ought to be, a discretion of *grace* and *indulgence*. Thus, our Act of 1815 (Rev., ch. 895) authorizes a Judge to grant a new trial to a defendant convicted of a criminal charge. It is, indeed, a mighty power, but it is a power only to do *mercy*. The prisoner has been tried according to the forms of law, has had the full exercise of every legal privilege, has been convicted regularly by the appropriate tribunal, and can complain of the withholding of no *right* if the Judge declines to interfere between him and the sentence of the law. But to (541) vest the Judge with the irresponsible and uncontrollable power to dispense with positive legal requirements intended to secure the upright administration of justice, and to decree when their non-observance should and when it should not invalidate what was done in contempt of them, ought not to be, under a government of laws.

The trial by jury, justly considered as the strongest security to the liberties of the people which human sagacity ever devised, as well as the happiest contrivance for cherishing among all an affectionate attachment to the laws, in the administration of which they act so important a part, must be kept under the protection of law and not left under the *patronage* of its *ministers*. If the old rule be disregarded, new ones must be devised. To proceed wholly without rule would be intolerable, and the courts, for their own convenience, as well as for the public order, would be obliged, as it seems that the Judges in New York have done, to make rules. With the most sincere deference for the opinion of my brethren—for, as none know them better, none can respect their advised judgment more than myself—I do believe that we have such a rule already, "not the product of the wisdom of some one man or society of men in any age, but of the wisdom, counsel and observation of many ages of wise and observing men"; that this rule declares a verdict rendered by jurors who have gone at large *suspicious*, and requires of its ministers, unless it is seen that in fact there *could not be* the tampering or improper communication which the law suspects, to pronounce it *bad*.

PER CURIAM. Judgment affirmed.

Cited: S. v. Lytle, 27 N. C., 62; *S. v. Godwin, Id.,* 404; *S. v. Moore,* 29 N. C., 231; *S. v. Tilghman,* 33 N. C., 553; *S. v. Rash,* 34 N. C., 387; *S. v. Harris,* 46 N. C., 196; *S. v. Hester,* 47 N. C., 86; *Moore v. Edmiston,* 70 N. C., 478; *S. v. Durham,* 72 N. C., 448; *Thomas v. Myers,* 87 N. C., 33; *S. v. Barber,* 89 N. C., 526; *S. v. Gould,* 90 N. C., 664; *S. v. Harper,* 101 N. C., 764; *S. v. Crane,* 110 N. C., 537; *S. v. Jenkins,* 116 N. C., 975; *S. v. Boggan,* 133 N. C., 766.

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(542)

AMOS WADE v. DANIEL L. RUSSELL.

When the shipper agreed to load a vessel "in a reasonable time," it was *held*, that he was bound to pay for every unreasonable delay that occurred; and the fact of his residing at a distance from the shipping port made no difference in the obligation created by the articles.

DEBT, brought upon the following instrument:

"It is hereby agreed between Amos Wade of the one part and Daniel L. Russell of the other part, witnesseth: That Amos Wade hereby agrees that the schooner Wade shall, after she returns from New York and makes another coasting voyage, return to Swansboro and take a load of turpentine for the said Russell to New York, at fifty-two and a half cents per barrel; and in case the said Wade may refuse to comply he shall forfeit and pay to the said Russell the sum of two hundred and fifty dollars. And it is further agreed that, in case the said Russell shall fail to load the said schooner Wade in a reasonable time after her arrival at Swansboro, at the above freight, he shall forfeit and pay to the said A. Wade the sum of two hundred and fifty dollars.

"Witness this, our hands and seals.

"New Bern, 12 February, 1833.

"DANIEL L. RUSSELL, [L. S.]
"AMOS WADE. [L. S.]"

The breach assigned in the declaration was the failure of the defendant to load the schooner Wade in a reasonable

time after her arrival at Swansboro. The defendant pleaded general issue, covenants performed and not broken.

Upon the trial at CRAVEN, on the last circuit, before his Honor, *Judge Saunders,* it appeared in proof that the schooner Wade arrived in ballast at Swansboro on Saturday, 16 April, 1833; that her ballast was thrown out on Tuesday following, and that on the next day, viz., on Wednesday, she hauled alongside the wharf and was ready on the evening of that day to take in her load; that on the same evening, or the next morning (Thursday), the defendant had notice that the schooner was ready to receive her load; that (543) the defendant had no turpentine on the said Wednesday at Swansboro, and did not have the same there till the following Saturday; that on Monday they began to load the schooner, and the turpentine was received and the vessel loaded on the following Wednesday; that neither the plaintiff nor his captain made any objection to receiving the load, and that the defendant was willing to pay twelve dollars for the detention, which the captain said he was not authorized to receive. It was further in evidence that the defendant lived about ten miles from Swansboro, and that the plaintiff was aware of this at the time he made the contract in question. His Honor instructed the jury "that the plaintiff was bound to show that he had his vessel at Swansboro within a reasonable time after performing the trips mentioned in the contract, and had given the defendant notice of his readiness to take the load on board. So the defendant was bound to have the turpentine at the place in readiness to load the vessel after her arrival. If they were satisfied that the vessel was prepared to receive her load on Wednesday, the 20th, and that the defendant was notified of that fact on that day or the next morning, they would give the plaintiff damages for each day's detention after that time until the day when they began to load, and for every day afterwards, provided there was any unreasonable delay in loading after Monday, the time the turpentine was in readiness for delivery." It having been proved that fifteen dollars was a reasonable demurrage per day for vessels of the size of the Wade, the jury found a verdict for sixty dollars damages in favor of the plaintiff. The defendant obtained a rule for a new trial, upon which being discharged, he appealed.

W. C. Stanly, for the defendant: The Judge was mistaken as to the meaning of the contract. The defendant was not bound by it to have the turpentine at the place of delivery upon the vessel's arrival there. He was only bound to load within a reasonable time. He lived ten miles from Swansboro, which was known to the plaintiff at the time when the contract was made. The Judge ought to have sub-
(544) mitted the whole to the jury as to whether the vessel was loaded within a reasonable time, or whether there was any unnecessary delay. In some cases the question of the reasonableness of time is one of law, but where a variety of circumstances are taken into consideration the whole must be left to the jury to find what is reasonable time.

2. The cargo was received on board the vessel without any objection on the part of the plaintiff or his captain, which was a waiver of the delay. Chitty Cont., 273, note n.

No counsel appeared for the plaintiff.

RUFFIN, C. J. It is imputed as an error in the opinion of his Honor that it absolutely requires the articles intended to be shipped to be at the shipping port before or as soon as the vessel was ready to receive her cargo. It is said the agreement contains no such clause, and that it could not be material to the plaintiff where the cargo was, provided it were put on board in a reasonable time.

It is true there is not in the charter party a distinct provision that the defendant should have the cargo at Swansboro at any particular time. Had the plaintiff declared on the deed as containing such a stipulation, either expressly or according to its legal effect, as a substantive stipulation, there would have been force in the objection. But that is not the case. The gravamen of the complaint is not that the cargo was not at the place upon the arrival of the vessel, but that no part of it was put on board for four days thereafter, and that the vessel was thereby unnecessarily and unreasonably detained for that period. That is the breach assigned in the declaration. Upon the case thus stated the alleged error appears to us to be a mere verbal criticism upon the language of the Judge, as laying down a general proposition, instead

of regarding it in connection with the point actually in controversy between the parties.

Had the turpentine been on the wharf at which the vessel was lying, and the merchant refused or neg- (545) lected to deliver it, no one would say that the owner ought not to have compensation for the detention. The defendant in this case, is no less the author of the delay than if he had wilfully withheld the cargo; and the loss to the plaintiff is the same in both cases. So likewise is, consequently, the injury, unless the stipulations of the parties allowed to the defendant, a longer time to load, in the case which has happened, than he would have generally. The contract is silent as to any particular number of days to be allowed for loading, or during which the vessel might be detained upon demurrage. It is in general terms, that the defendant shall furnish a cargo at Swansboro, and load the vessel in a reasonable time after her arrival. There is nothing, therefore, in the instrument to exonerate the defendant from the ordinary liabilities of a merchant, contracting to ship on freight, at a particular port; which, necessarily, includes a delivery at that place, and at the time agreed on. But it is obvious, from the evidence offered by the defendant, that on the trial he insisted, that although the delay might be deemed unreasonable if he had lived in Swansboro, and had his turpentine on the beach, yet it was excused in him, because he resided ten miles off, and could not sooner bring the articles to the vessel, after notice of her readiness. It was in reference to this pretension, that the Judge laid it down that the defendant was bound to have the cargo at the place in readiness to load the vessel at her arrival; not, as we understand him, that the plaintiff could recover merely because the cargo was not at the place, but that a delay in loading was not justified by the circumstance that the cargo was not at the port, but at the defendant's residence, and that, to save himself from damages for the detention, the defendant ought to have had the cargo at Swansboro, instead of at his own house. In that opinion this Court concurs. If the defendant was not confident of providing the cargo by the arrival of the vessel, he should have protected himself by a reservation of so many days' detention. The excuse that he could not buy the cargo at all, would be as satisfactory as that he could not

(546) have it at the place in due season. Nor will it do for him to say that he used diligence to get it there after the vessel arrived. By the agreement, the vessel is to wait for nothing, after her arrival, but to be loaded. It is presupposed that the cargo is in readiness; and that she will be detained no longer than is necessary to put it on board. In this sense, therefore, we think it correct to say, that the shipper was bound to have the cargo there or pay damages for its detention. To the plaintiff it is the same, whether the defendant would not, or could not, load the ship in a reasonable time after her arrival.

It is not material to consider whether the jury or the Court must ordinarily determine the question of reasonable time. A case proper for the jury, perhaps, might have been made upon evidence as to the size of the vessel, and cargo, the assistance to be had at the port, and the usual time occupied in loading at that place, if the dispute had been, whether the shipment begun in due time, had been completed in due time. But this verdict confines the damages to the period during which the vessel and crew were kept entirely idle. For that delay the plaintiff is entitled, in law, to recover. A delay in beginning to load for four entire days must be unreasonable.

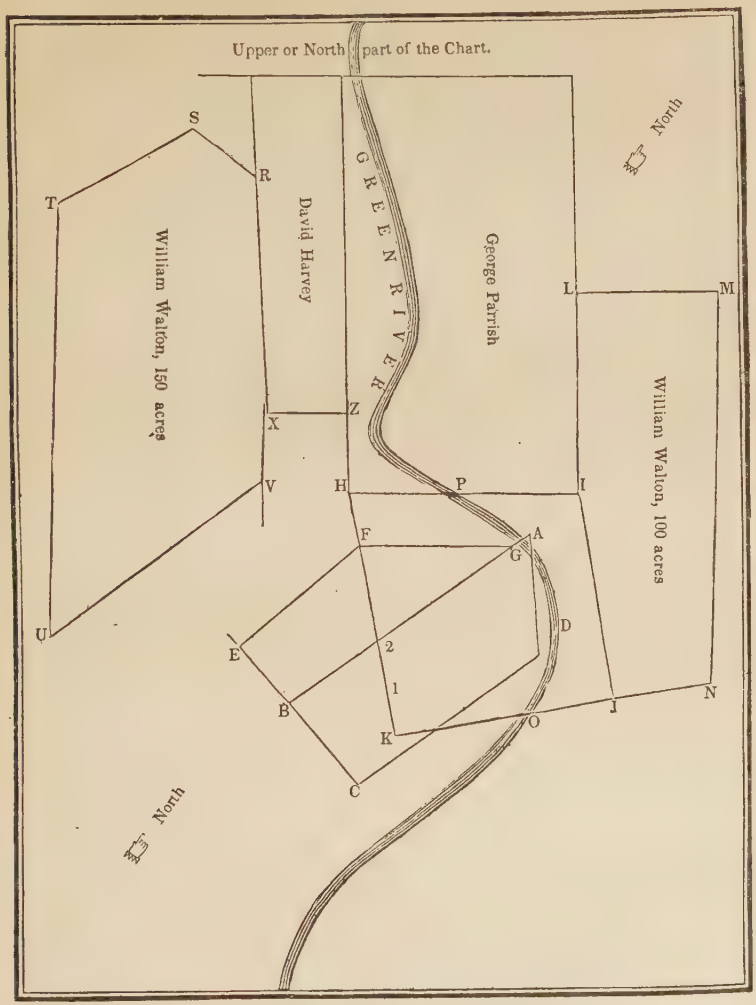
PER CURIAM. Judgment affirmed.

DEN ex dem. JOSEPH McD. CARSON v. JOHN MILLS and LOWRY BURNETT.

Although the possession of part of a tract of land is in law the possession of the whole when there is no adverse possession, yet if the land be composed of different tracts, held under different grants, and described in the deed to the person in possession by different boundaries, an actual possession upon one does not in law extend to the other; and if both are covered by an elder grant, the statute of limitations perfects the title of that only on which there was an actual possession.

EJECTMENT, tried before *Strange, J.*, at RUTHERFORD, on the last circuit.

The lessor of the plaintiff claimed title under two (547) separate grants; and to understand the case, it will be necessary to consult the annexed map.



First, he claimed title under a grant to one John Burnett, which issued in the year 1767, and is represented on the map by the lines H, I, J, K. The defendant claimed under two grants, one of which issued to Samuel (548) French, in 1780, and is represented on the map by

the lines A, B, C, D; the other was dated in 1801, and issued to Benjamin Cook, and is represented on the map by the lines G, B, E, F. The land covered by the two last-mentioned grants, was conveyed by separate deeds from the respective grantees, or those claiming under them, to one Murray, who in 1813 conveyed them both by one deed to the defendant Mills, describing them as "that tract or tracts, pieces or parcels of land, in, etc., on, etc., included in two surveys, viz., one tract containing, etc., beginning, etc. (as in the grant), granted to Samuel French, on, etc. Also one other tract, beginning, etc. (also as in the grant), granted to Benjamin Cook, on, etc." In the *habendum*, the description was, "which said tracts, pieces, or parcels of land, etc." Immediately after his purchase, the defendant Mills took actual possession of the land conveyed by the grant to French, where it interfered with the lines of the grant to Burnett, but not where it interfered with those of the grant to Cook, say at Y; and continued this possession within the boundaries of the grant to French until the year 1829, when he leased to the defendant Burnett that part of the land covered by the grant to Cook, which interfered with the grant to Burnett, who took possession and committed the trespass for which this action was brought, say at X. While the defendant Mills was in possession as above stated, the lessor of the plaintiff purchased from the heirs of Burnett, who had been long out of possession, and with whom he could show no previous connection; but he was in the actual possession of a small piece of land at A, covered by both the grant to Burnett, and that to French, where the latter crossed Green River. The only color of title under which he held was a grant to William Walton, for one hundred acres, described on the map by the lines L, M, N, O, P, I, and calling for the river as one of its boundaries, and which also covered the small interference between the grants to Burnett and French at A. The possession of the lessor of the plaintiff on the south side of the river, was confined to the lines H, P, G, F, and did (549) not extend to any part of the land covered by the grant to Cook. Secondly, the lessor of the plaintiff claimed as follows: He produced a grant dated in 1798 to William Walton, for one hundred and fifty acres, R, S, T,

U, V, X, and deduced the title by mesne conveyances to himself. He proved that at the date of this grant, Walton was the owner of the two tracts of land designated on the map as David Harvey's and George Parrish's; he contended, that after running the courses of the grant to X, the next course being then "with his own line south forty degrees east, and with *Murray's* line two hundred and six poles, to a stake in Murray's line—thence south six east to the beginning"—he must either follow X, Z, H, and thence to the river, and thence down the river to Murray's line at G, and thence go directly to U, the beginning; or he must follow Murray's line A, B, to its termination, and then run to the beginning; or else, running according to the course and distance, he must from V, run the line of his survey to the nearest point in Murray's line A, B, and then to U, in either of which cases the *locus in quo* would be included in his grant. There were no marked lines found upon any of Murray's lines, except upon the line C, D.

The plaintiff then offered to show trespasses by the defendant Mills at other points besides X, but as Mills had made himself party to defend the possession of his lessee, Burnett, the Judge refused to admit the evidence. His Honor instructed the jury, that although the plaintiff might have recovered upon a demise by the heirs of Burnett, the defendant was so adversely in possession of the land covered by the grants to French and Cook, at the time the lessor took his deed from them, as to prevent a recovery on the demise set forth in the declaration. That as to the second mode in which the lessor of the plaintiff sought to establish his title, it was their province to ascertain whether the descriptive objects mentioned in the grant to Walton, were to be found, and where and what land was embraced within them: that in locating grants where all the objects of description referred to were to be found, and the several modes of description, in their application to the objects really existing, harmonized with each other, there was no difficulty; but where various descriptions in a grant could not be made to harmonize with objects as they existed, that description in which there was least room for mistake, should be taken; that other more particular rules had been adopted, which were, that where a natural boundary was called for, it (550)

must be adopted, to the exclusion of all other descriptions; that where trees had actually been marked for boundaries, they must be taken in exclusion of any other description except a natural boundary; that the lines of other grants, when distinctly marked and established, was a description to be preferred to course and distance; that when the description was by course and distance alone, they were of necessity to be followed—as they were when they were accompanied by descriptions of existing objects which could not be found; that in the application of these rules, if they were satisfied of the existence of any line of Murray's regularly marked and distinctly known at the date of the grant to Walton, and indicated by something more certain than course and distance alone, whether that line was the line A, B, or any other line, and further believed that was the line referred to in the grant to Walton, they were bound so to locate the grant as to reach it and include some part of it; but that if they believed no such line ever existed, except as indicated by course and distance, there were no means left of locating the grant, except by following its calls.

The counsel for the plaintiff moved his Honor to instruct the jury that the possession of a part of a tract of land did not extend to the whole thereof, when the proper title under which it was held interfered with an elder grant, although he who claimed title under the oldest grant was not in the actual possession of any part of the land covered by it. His Honor declined giving this instruction, but informed the jury that when two persons were in possession of parts of their land covered by paper titles which interfered, neither of them having actual possession of land within the interference, the law adjudged the possession of the interference to be in him who had the oldest title; but when he who had the oldest title was in possession of no part of the land
(551) covered by it, and he who had the youngest title was in the actual possession of any part of the land covered by it, although his possession did not extend to the interference, the law adjudged his possession to be co-extensive with his paper title, notwithstanding its interference with the elder title.

A verdict being returned for the defendant, the plaintiff appealed.

D. F. Caldwell and *Badger,* for the plaintiff.
Pearson, for the defendant.

RUFFIN, C. J. Several exceptions are taken to the instructions in this case. Those principally discussed and relied on relate to the opinions expressed by the Court on the extent and effect of the defendant's possession. Having refused to give certain instructions prayed for by the defendant's counsel, the Court laid it down to the jury, that "when two persons were in possession of parts of their lands, covered by paper titles which lap, neither having any actual possession within the lappage, the law adjudged the possession in him who had the elder title; but where the holder of the elder title was in possession of no part of the land covered by his title, and he who had the younger title was in possession of any part of the land covered thereby, although such possession might not be within the lappage, the law adjudged his possession co-extensive with his title, notwithstanding its lappage upon an elder title, of which there was no possession." The materiality of this instruction to the rights of the parties, upon the facts stated in the record, is not perceived. For if the two tracts conveyed by Murray to Mills are to be regarded as one, so that the entry by Mills into either portion is an entry into the other portion of the entire tract, then Mills had made such an entry, within the admission of the plaintiff's counsel, for he was actually possessed of that part of the French patent which the patent to Burnett also covered. If, on the other hand, the two tracts continued several after the conveyance to Mills, then the possession on the one could not embrace the other, unless the other instruction, which will be hereafter noticed, be correct; which would render the one now under consideration unnecessary and immaterial. We might, therefore, be relieved from passing on this, (552) without omitting any duty to the parties. But we conceive the doctrine involved in the instruction to be of such importance as to entitle it to notice; and since the opinion of this Court upon one part of it is to be contrary, that we are not at liberty to give to it the sanction of our silence.

To the former of those positions we fully subscribe. If a part of a tract of land be covered by two deeds, and he who has the better title be in possession, not of that, but of another

part of his tract, he has, by legal intendment, the actual possession of the whole, unless the other have a possession within the intersecting lines. Why? For the plain reason, that both parties cannot, at the same time, be seized of the same land, under their respective deeds; and therefore, he who has the title is deemed in the exclusive possession, since he can have no action against the other for any possession by him.

The same reason applies with equal force to the case supposed in their latter branch of the instructions: from which this Court dissents. The error, as it is esteemed by us, has its root in an assumption of fact, which is not warranted by the law, and is contrary to a legal presumption. It assumes that the true owner is not in possession. Now that cannot be, unless another have the actual possession; for, by force of his title, he has constructively the possession until it be destroyed by an adverse possession; and there can be no adverse possession against which the owner cannot have an action to recover the possession. The question is, what sort of possession in another will terminate that which the owner has by construction, so as to enable him to say, that he is out of possession, and to demand it from the other? Certainly, as we think, it must be an actual possession of some part of *his* land. If the possession be outside the interference, he cannot maintain ejectment; for that can be done only by showing a trespass on the premises, *described in the declaration,* that is, within the boundaries of his own deed. In the case supposed there is no such trespass; for the actual possession of him who is considered the wrong-doer is admitted not to be (553) within the land of the other. It is not correct to state, therefore, that the owner is out of possession, because he is not actually seated on any part of his land. His possession exists in his whole tract, until some part of *that* be usurped by another, so as to oust him from that part, and there can be no such usurpation but by occupation within the better title. In *Fitzrandolph v. Norman,* 4 N. C., 564, it is laid down, that "persons owning adjoining tracts of land, which lap upon each other, *neither being in the actual possession of the part covered by both conveyances,* will be deemed in possession according to the title." Here it will be perceived, that as being an immaterial circumstance, no notice is taken of possession, on either side, of those parts of the tracts

not covered by both deeds. In the recent case of *Green v. Harman,* 15 N. C., 158, the Court took the rule as settled, "that if there be two patentees, the entry of the younger on his own land does not oust the other, unless it be on that part of the land covered by both titles." In *Dobbins v. Stephens, ante,* 5, it was repeated in these words: "If neither claimant be in actual possession of the land covered by both deeds, the seizin is in the owner, but if one of them be on that part, and the other not, then the possession of the whole interference is in the former." Why? Because he can then be sued for the whole. We find the same doctrine established in other States situated like our own. In Kentucky it was thus held, in *Frimble v. Smith,* 4 Bibb, 257, and in *Smith v. Mitchell,* 1 Marshall, 207. In *Talbot v. McGavock,* 1 Yerger, 262, the Judges of the Supreme Court of Tennessee admit it to be clearly so at common law, and under our Act of 1715; and the majority of the Court, in able opinions, maintained it as applicable to a new statute of that State, which enacted that "any person holding seven years peaceable possession of land under a grant or deed, shall be entitled to hold possession, in preference to all other claimants, of *such quantity of land as shall be specified in his or her grant or deed.*" Notwithstanding these last words, it was adjudged, that a possession of "the disputed land" was meant; and, therefore, that where the part actually occupied is not within the bounds of the elder title, the owner is not barred. Indeed it (554) would be strange, if the law were against the fact, to construe an entry into part to which the party had right, to be also an entry into another part to which he had no right; a construction the more harsh and unjust, because the sole effect of it is to put out him who has the right, without giving him any remedy therefor.

The Court further instructed the jury, that, under the circumstances stated in the exception, Mills was in 1817, in the adverse possession of the tract granted to Cook, so as to prevent the deed then made by Burnett, from passing any title in that tract to the lessor of the plaintiff. To this instruction several objections are taken.

It is urged, first, that the entry of Burnett into any part of the land, covered both by his deed, and that to Mills, claiming the whole, vested the possession of the whole in

him, and determined the possession of Mills; and that the acceptance of the deed for the whole from Burnett, by the lessor of the plaintiff, then in the occupation of the small piece on the north side of the river, is equivalent to such an entry by Burnett himself. This objection goes much beyond the claim of the plaintiff in the Superior Court, and, if well founded, would render the deed effectual for the French, as well as the Cook tract; which seems not even to have been contended on the trial. We think, however, that it is not tenable as to either.

Without considering all the purposes to which an entry of the owner into part may enure, or to what extent an entry on a trespasser may determine his possession, the Court agrees that such an entry so far reinstates the owner in the possession as at the least to render his conveyance, sealed and delivered, on the land, valid; and that it may be the same, when he conveys to one who is already in possession, as well as the other trespassers, and claiming adversely to him. But this principle cannot reach a case in which the two possessions supposed are clearly of different portions of the land, as distinct parcels. The owner may be disseized of one part of the same tract of land by one person, and of another part by another person, each claiming the part in his own possession, and not claiming the other. A recovery from (555) one does not disturb the other; much less will the entry upon one oust the other. Here Carson and Mills had such several possessions of distinct parcels of the French grant. Neither was answerable for the wrong of the other, and the owner might obtain complete redress against one, without seeking any from the other. There was no entry, in fact, upon Mills, and we cannot, without going beyond the intentions, at the time, of the parties themselves, say that his possession—as far as it extended—was legally terminated or suspended by the entry on Carson, or by the deed to him, while in possession of a particular parcel, under a different claim. The only question, then, is, how far Mills's possession legally extended. It was a real *positio fudis* on the French grant, and therefore the lessor of the plaintiff undoubtedly acquired no title to that part, and the instruction is not upon this objection, erroneous.

We are then brought to the inquiry, whether Mills also had possession of the Cook grant, to which the instruction is, by its terms, confined. If he had not, the deed to the lessor of the plaintiff passed that, and the plaintiff was entitled to a verdict; and, consequently, then, ought to have a new trial. There was no actual possession of it, indeed; no clearing on it by Murray, Mills, or any other person, until Burnett leased from Mills in 1829.

The principle on which his Honor proceeded, is, that possession of part is the possession of the whole; and here Mills lived on part of the disputed land; that is, on what is covered by both deeds. We think the principle does not reach this case. Upon a reason similar to that on which the preceding objection was deemed invalid, namely, the division of the land into distinct parcels, we think the rule was misapplied to this part of the case. The doctrine, from its nature, can only relate to an entire thing; a possession of part being a possession of the whole—of what? of that of which it is a part; and not of that which is separated from it. It is contended, however, that these tracts were united and became one, because the same person owned both, and acquired them by the same conveyance. Neither of these circumstances necessarily tends to such a conclusion, nor do they in conjunction. The law gives possession to the owner of (556) land not occupied by another. But where the title is not derived by a conveyance, but is set up as constituted by possession, it must be an actual and not an ideal possession. Of the same nature must be the possession of a trespasser, to render the deed of the owner inoperative. Now the owner and occupant of a piece of land may purchase another piece, adjoining; and if his title to it be good, he is in possession without more doing. Even in that case, the several parcels do not necessarily lose their distinct character, and sink into one whole. They may do so, for many purposes, if the owner so regards them, and a great variety of circumstances may satisfy the mind that his intention was the one way or the other; as giving a general name, or cultivating as one plantation, or the reverse. But it cannot be admitted that they are united for any purpose, by the mere facts of being claimed by the same person, and being adjoining to each other; and much less, that they can thus become united, to the prejudice

of third persons. The purchase simply, or any declarations of the purchaser, unaccompanied by acts on the land, give no action to the owner; at least, none founded on his possession, as continuing, or as being ousted. Burnett could not have brought ejectment against Murray for the Cook land, upon his purchase of it in 1802, for that being the *only parcel* described in the declaration, the possession of the defendant must be shown to be within *that*. Although Murray might have given a general name to both, under which both would have passed as one tenement under his will, or by his deed; yet he did not occupy any part of the Cook grant, and, for the reasons before given, was consequently, not in possession of it, so as to oust Burnett therefrom. Did the deed to Mills produce a new state of things, and make what was not a possession in Murray become a possession in Mills? Ordinarily, not more than one tract is conveyed in the same deed; for if the vendor acquired the estate in several contiguous parcels, when united in him as to the title or the claim of title, and sold together, they are usually surveyed together, and described as a single tract. Hence the purchaser, in pos-
(557) session of any part of the land conveyed by that deed, is said to be in possession of the whole, and according to his deed, for the deed professes to pass but one thing. But to make them one whole, by force of a conveyance of them to the same person, and by the same instrument, the change of character ought explicitly to appear in the conveyance. He who actually succeeds to nothing more than the actual possession of his predecessor, ought not to require, presumptively, a larger actual possession, unless it be clear on the deed, that he did not take the estates as the other had them, and, therefore, did not hold them as he held them. If the description be not by a common name, or by lines going around both, but be of each tract as of a separate parcel, not stating even that they adjoin, the idea of undivided unity is excluded. Such, we think, is the character of the deed set out in the exception. Upon the most favorable construction for the defendants, it is but equivocal. It purports to convey all the "tract or tracts, pieces or parcels of land lying on the south side of Green River, included in two surveys, to-wit: The first tract containing one hundred acres, beginning, etc., and granted to S. French, on 25 March, 1780; also one

other fifty-acre tract, beginning, etc., and granted to B. Cook, on 18 November, 1801; the above tracts supposed to include by estimation, one hundred and fifty acres, more or less; which said pieces or parcels of land, he, the said P. Murray, doth hereby bargain and sell unto the said John Mills, and his heirs." The only word on which a plausible argument for the entirety of the land, can be founded, is "tract" in the beginning. But the effect of that is neutralized by those immediately succeeding, *"or tracts, pieces or parcels."* These expressions alone might leave it doubtful in what sense the parties understood their contract. If so, it ought not to be taken most favorably for them against third persons. But that doubt is, in our opinion, removed by what is subsequently stated, and omitted in the deed. It proceeds to denominate the land as *"the first tract,"* and as *"also one other tract";* and particularly describes each by its several boundaries, according to the patent for it, and in the *habendum* clause *again* calls them *tracts, pieces, parcels,* and omits the fact of their contiguity. There is then nothing in (558) the deed common to both, but the consideration and the warranty; which may as well be where the two tracts are remote, as where they adjoin. If they were, in fact, remote, the propriety of this qualification of the rule, that possession of part is the possession of the whole, would be manifest. That shows that the whole meant is that which is *according to the deed,* a whole. If that be true, it follows, that, although they adjoin, yet if they be not described as adjoining, so that it might be seen that they were to pass as one entire thing, they must pass as distinct parcels, according to their respective boundaries; and the possession of one cannot be the possession of the other; for that would *not* be according to the deed. Mills was not more liable to the action of Burnett, in respect of the Cook tract, merely upon his purchase and his entry into the French tract, than Murray was upon his purchase of the Cook tract, and previous and continuing occupation of the other. In other words, the possession of one tract of land, as such, is not the possession of another tract, although they happened to adjoin. There must be an actual occupation of some part of each, to oust their respective owners.

Upon the construction of the patent to Walton, the opinion of the Court is against the plaintiff. We do not understand the Judge as laying down a general position, that the call for another's line is to be disregarded, if it had not been marked, and was to be ascertained by running the course and distance from a given point. We cannot so understand him, for if that point be known the line must be certain. We take the language with the context, and with a reference to the case before the Court; and, so considered, we concur in opinion with his Honor. The object in all boundary questions is to find some certain evidence of what particular land was surveyed, or was intended to be conveyed. Course and distance approaches very nearly to permanent certainty if any one of the *termini* be identified; and that is the usual description. But there may be a defect in the instrument, so as to run the line inaccurately; or there may be a mistake in setting down the course and distance. If, therefore, (559) other things be called for, as to which there is less probability of error, they shall control the other calls. Such is the case where the call is for a natural boundary; with respect to which there is but little fear of mistake at the time of the survey, and but little difficulty in identifying it at a subsequent period. But even in that case, evidence may show which is, for instance, the stream called for, or which the parties took to be that to which they have given the name; though the necessity for such evidence seldom arises, because parties cannot readily fall into such mistakes. When the call is for the line of another, it has also been held that course and distance may yield to it. But it is, obviously, not so decisive as the call for a natural boundary; and the mind may be under a perfect conviction, from other circumstances, that the mistake is not in the course and distance, but in supposing that the other had a line at the end of the course and distance. If that conviction exists, there ought to be no deviation from course and distance. Such, it seems to us, is the case here. If, for instance, the line be proved, satisfactorily to the jury, to be at a particular place, and they can collect that at the time of the conveyance, in which it is called for, it was an established line, known or reputed to be there, which is to be presumed *prima facie,* then it affords a ground for the further presumption that the parties meant

to go to it. So if the call be for a particular identified corner of the tract. Thus we understand the rule, as laid down by *Chief Justice Taylor* in *Cherry v. Slade,* 7 N. C., 90. But if the jury be satisfied that, at the time of the survey, there was no known line, and that it was understood by the parties to be at a different place from what it turns out to be, we think they must abide by the course and distance. As evidence upon these points—that is, whether there was a known line, and which is the line meant or understood by the parties—the facts that the line was marked or unmarked, that the corners were or were not previously identified, that the owner claimed up to a particular line as his, or that there was no previous claim or reputation, are most material. If the jury believed, upon all these points, in (560) the negative, then such a line, although it can now be ascertained mathematically, ought not to conclude, because it does not furnish as probable and rational *data* for the ascertainment of the actual location as the course and distance. It would be appealing from evidence, certain to a common intent, to a thing altogether unknown to the parties at the time. This, we take it, was the meaning of the charge to the jury, and we deem it proper in the particular case. Only the first line of the French tract was marked, and the other four were open, and there was no evidence that any one of the four was known, even by reputation, or that any person lived on the land or claimed to any particular points. The line called for, if it be that now ascertained, cannot be reached in any one of the methods claimed by the plaintiff without adding greatly to his quantity of land, inserting another line in his survey and patent, and including a large portion of the land previously granted to Cook. These circumstances afford almost conclusive proof that this was not the line called for, and that the parties believed that Murray owned the land between Cook and Walton as laid down in the plot, and that his line began at the termination of that of the Harvey patent and pursued the same course. If so, the call ought not to overrule the other calls, which are certain in themselves.

The Court is also of opinion that the plaintiff could not give evidence of other trespasses of the landlord himself. He did not become sole defendant, as claiming title to all the land mentioned in the plaintiff's declaration, of a great part

of which, indeed, the lessor of the plaintiff was himself in possession. But he united with Burnett in his defense—that is, to show that the plaintiff had no title to the land in Burnett's possession. It might not be necessary in such a case to prove Burnett in possession of any particular place as against the landlord, who admits him to be in possession as his tenant by engaging to defend him. But it would be a surprise if he were called on to defend for other portions of the land, which the plaintiff's own evidence would (561) show had not been in Burnett's possession. This case is, in this respect, nearly the converse of that of *Gorham v. Mooring,* 13 N. C., 174.

But, for the errors on the other points, the judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed.

Cited: Balfour v. Davis, 20 N. C., 448; *Bynum v. Carter,* 26 N. C., 313; *Wallace v. Maxwell,* 29 N. C., 137; *Smith v. Ingram, Id.,* 178; *Williams v. Miller, Id.,* 188; *Cohoon v. Simmons, Id.,* 191; *McDowell v. Love,* 30 N. C., 504; *King v. Brittain,* 32 N. C., 118; *Lenoir v. South, Id.,* 241; *Hairston v. Stinson,* 35 N. C., 480; *Brown v. Potter,* 44 N. C., 463; *Loftin v. Cobb,* 46 N. C., 409; *Morris v. Hays,* 47 N. C., 95; *Gause v. Perkins, Id.,* 226; *Corn v. McCrary,* 48 N. C., 499; *Atwell v. McLure,* 49 N. C., 377; *Campbell v. Branch, Id.,* 314; *Mason v. McCormick,* 75 N. C., 266; *Mizell v. Simmons,* 79 N. C., 187; *Hamilton v. Icard,* 114 N. C., 540; *Brown v. House,* 118 N. C., 872.

DAVID McCARSON'S administrators v. BENJAMIN RICHARDSON.

The Act of 1828, ch. 12, sec. 1, which enacts that a justice's execution shall bind personal property only from its levy, was passed for the protection of purchasers, from the defendant in the execution only, and, therefore, if the defendant dies after the *teste* of such an execution, but before its *levy*, his administrator is bound thereby, and the goods in his hands may be levied upon and sold without a *scire facias* to revive the judgment.

Trespass vi et armis; and, upon the trial at Buncombe, on the last circuit, before his Honor, *Judge Strange,* the facts appeared to be as follows: One Kimsey obtained a judgment before a justice of the peace against one Byers, and had an execution issued thereon, but Byers died before the levy, which was made afterwards, and the property sold, when the plaintiffs' intestate became the purchaser and took possession. The defendant, as the administrator of Byers, retook the property from the possession of the plaintiffs' intestate, contending that the operation of the Act of 1828, ch. 12, sec. 1, the levy and sale by the officer after the death of Byers passed no title to the purchaser; and his Honor, being of this opinion, directed a nonsuit, whereupon the plaintiffs appealed.

No counsel appeared for either party in this Court.

Daniel, J., after stating the case, proceeded: Goods and chattels were bound at common law by the writ of *fieri facias* from the time of its *teste.* Arch. Prac., 285. *Bona fide* purchasers of the defendant in an execution were often liable to have their purchases defeated and the goods taken from them by the relation of the execution to its *teste.* The Legislature in England remedied the evil by (562) Statute 29 Charles II., ch. 2, sec. 16, which enacts that no writ of execution against the goods of a party shall bind the property thereof but from the time such writ shall be delivered to the sheriff to be executed; and, for the better manifestation of such time, the sheriff or his deputy shall, upon receipt of such writ, endorse upon the back thereof the day of the month and year whereon he received it. Since the passage of this act all persons in England wishing to be

safe in their purchases of goods and chattels can, by examining the sheriff's office, readily know whether the property is bound by any execution lodged there against the person offering to sell. This statute, however, was intended only to protect purchasers from any injury which might arise to them from the relation which writs of execution had to their *teste* at common law; and, therefore, as far as relates to the party himself, and to all others but purchasers for a valuable consideration, writs of execution still bind the party's goods from the time of their *teste*. 1 Saund., 219f; 2 Vent., 218; 2 Show., 485; 1 Arch. Prac., 285. The Statute 29 Charles II. was never considered in force here; therefore, all our executions were governed by the common law and bound the property of the defendants in them from the *teste*. Many inconveniences and frauds were the consequence, especially under execution upon justices' judgments which were not of record and frequently unknown to the public until the executions came to be levied, when they bound all the personal property which the defendant owned at the time of the *teste*, although a *bona fide* purchaser of the defendant had paid his money for the same between the time of the *teste* and the *levy*. The Legislature of this State has not reenacted the sixteenth section of the Statute 29 Charles II., ch. 2, but partially remedied the evil by passing the Act of 1828, ch. 12, sec. 1, which is in the following words: "Where any execution shall be issued by a justice of the peace and levied on personal property, such property shall be and the same is hereby bound by and from the levy of such execution, and not from the *teste* thereof." Frauds upon purchasers from the defendant in the execution were in a great (563) measure prevented either by the officer taking the property which he had levied on into his possession, or taking sureties to a forthcoming bond, subscribed by one or more witnesses, as the act directs, which would tend much towards giving public notice of the transaction. The object of the Legislature, as far as it went, was the same as that of the British Parliament in enacting sec. 16, ch. 2, 29 Charles II., viz., to protect purchasers. But, as to the defendant in the execution and his representatives, no evil existed, and the common law remained unaltered. The goods and chattels are, as to them, still bound from the *teste* of the execution.

And, although the defendant in the execution died before the levy, the officer might go on, notwithstanding, and levy on the goods in the hands of the executor or administrator, and sell, and the purchaser acquired a good title. There was no necessity for the plaintiff in the execution to sue out a *scire facias* against the administrator. 3 Wilson, 389; 2 Lord Raym., 808; 1 Arch. Prac., 286. The nonsuit must be set aside and a new trial granted.

PER CURIAM. Judgment reversed.

Cited: Parish v. Turner, 27 N. C., 282; *Grant v. Newsom,* 81 N. C., 38; *Halso v. Cole,* 82 N. C., 164; *Grant v. Hughes, Id.,* 218.

THE PRESIDENT AND DIRECTORS OF THE STATE BANK v. JOHN W. LITTLEJOHN.

Where A owed B by bond, and it was agreed between them that A should pay the debt by instalments, and execute a new bond for the balance due after each payment: it was *held,* that an offer of performance by A was not a bar to an action on a bond delivered after the agreement was made.

DEBT, upon a bond executed by the defendant, in the following words:

"On 10 June next, with interest from the date hereof, I promise to pay to the president and directors of the State Bank of North Carolina, at the agency of the said bank at Edenton, the sum of five thousand seven hundred and twenty-six dollars, for value of them received, which debt is secured in a deed in trust to Augustus Moore, trustee, for the benefit of the said president and directors (bearing (564) date 15 June, 1829. In testimony, etc., this 10 June, 1834." Among other pleas, the defendant entered, first, "accord and satisfaction"; second, "accord with an agreement on the part of the plaintiffs to forbear, and promises on his part to pay."

Upon the trial at CHOWAN, on the last circuit, before his Honor, *Judge Dick,* the defendant offered to prove that on 10 June, 1829, he was indebted to the plaintiffs, payable at

their branch bank at Edenton, in the sum of nine thousand five hundred and ninety-nine dollars and twenty-seven cents; that he on that day entered into an agreement with the bank to pay the said debt by annual instalments of twelve hundred and fifty dollars until the whole should be extinguished; that he was to execute a deed of trust of his property for the benefit of the bank, and renew his bond, with security, annually, as he had done before. He then averred that he had executed the deed of trust according to his agreement, and offered to show it in evidence; and also that he had annually paid his instalments of twelve hundred and fifty dollars and renewed his bond at bank agreeably to his contract, up to 10 June, 1834, when the bank took the bond now sued on, the debt which he owed in 1829 being reduced by payments to the sum mentioned in this bond. The defendant then offered to prove that on 10 June, 1835, he tendered to the bank an instalment of twelve hundred and fifty dollars, together with a new bond for the balance, properly secured, but that both were rejected by the bank, contrary to the agreement, soon after which the present suit was instituted. This evidence was objected to by the plaintiff and was rejected by the Court, and, the plaintiff having obtained a verdict, the defendant appealed.

Iredell, for the defendant, referred to the case of *Good v. Cheesman,* 22 E. C. L., 89, and also to Chitty's note to 3 Black. Com., 15.

Badger, for the plaintiffs: A covenant not to sue (565) for five years is not a release, though one not to sue forever would be equivalent to a release to prevent circuity of action. A party may sue on a covenant of the first kind for his damages, if it be broken, or a court of equity might interfere if any irreparable mischief were likely to happen.

2. In the present case the deed in trust, to amount to a release, should have been executed by the plaintiffs.

3. A release cannot be of a debt which does not exist, for a man cannot release what he has not. A bond creates an obligation of itself, and the law will not look back for the

foundation upon which it was given. In this respect it differs from a parol contract.

4. At all events, the deed of trust cannot operate to prevent the bank from reducing the debt to a judgment.

Iredell, in reply: The object of the agreement was to receive a new note every year, which is inconsistent with the judgment being obtained. In this case the bond itself shows that the original debt was the foundation upon which the bond was given.

DANIEL, J., after having stated the case as above, proceeded: We are of the opinion that evidence offered by the defendant and rejected by the Court could not have sustained the plea of "accord and satisfaction." This plea always sets out what the defendant gave in satisfaction; it alleges the delivery, and it expressly avers that the goods, or things done, were *accepted* in satisfaction and discharge. *Drake v. Mitchell,* 3 East, 256-258; 1 Saund. Pl. & Ev., 24. The replication to the plea may either deny the delivery of the chattel in satisfaction, or, protesting against that fact, may deny the *acceptance.* Steph. Pl., 236; 1 Saund. Pl. & Ev., 24. In this case, if the pleadings were drawn out in form, the plea would aver a *delivery* of the twelve hundred and fifty dollars and the defendant's bond for the renewal, and that the plaintiff then and there accepted and received of and from the defendant the said sum of twelve hundred and fifty dollars and bond, in full satisfaction and discharge of the said sum of five thousand seven hundred and twenty-six dollars. The replication would deny the acceptance and tender an issue, which the defendant would be obliged (566) to join on that very point; and this we take to be done in the present case. To maintain the plea and support the defendant's side of the issue, it is not enough to show that he has always been ready to pay the money and renew the bond, or even a tender and refusal, but an actual acceptance thereof by the plaintiff must be proved. *Lamb's case,* 9 Rep., 60; *Allen v. Harris,* 1 Lord Raym., 122; *Beatson v. Schank,* 3 East, 233. The defendant did not pretend that he could prove by the evidence rejected that the twelve hundred and fifty dollars and bond tendered for renewal had been ac-

cepted by the bank in satisfaction of the bond now sued on. The evidence did not profess to go to that extent, and was therefore immaterial to the issue, and the Court properly rejected it.

As to the second plea, the parol agreement entered into by the parties on 10 June, 1829, cannot by any rule of law be received in evidence to support the plea of "accord," etc., to and concerning a bond executed 10 June, 1834, which bond did not recite the agreement or have any reference to it. *Mease v. Mease*, Cowp., 47, was an action of debt on a bond conditioned for payment at a certain day. Plea, that it was given as an indemnity to the plaintiff against another bond, and not damnified. Demurrer (*Lord Mansfield*): "The plea is certainly bad; let there be judgment for the plaintiff." He went on the ground that no parol evidence can abate or extend a bond or deed. In *Davy v. Prendergast*, 7 E. C. L., 63, the Court said: If a parol agreement is entered into to give time, supposing it the case simply of a common bond conditioned for payment of money at a certain day, it will not prevent the party proceeding at law immediately, whatever the consideration for the delay may be. The consideration for the agreement may induce a court of equity to direct that the party shall not proceed to enforce his remedy at law. The case cited of *Good v. Cheesman* does not aid the defendant. The case was this: The defendant being unable to meet the demands of his creditors, they had signed an agree-
(567) ment (which was assented to by the debtor) to accept payment by two-thirds of his annual income to be placed in the hands of a trustee of their nomination. The plaintiff, who had signed, afterwards brought *assumpsit* for his whole demand (the defendant's acceptance of two bills of exchange), and the defendant was permitted, under the plea of *non-assumpsit*, to give this agreement in evidence. The Court said it would be unjust that the plaintiff should prejudice the *other creditors*, who had neglected to recover their demands, under a persuasion that none of the parties who had signed would proceed against the defendant. The new agreement was received in evidence to prevent a fraud on third persons. We have looked into Mr. Chitty's note to 3 Black. Com., 15 (which was cited), and can discover noth-

ing there different from what we here lay down the law to be upon this subject. The judgment must be affirmed.

PER CURIAM. Judgment affirmed.

Cited: Matthis v. Bryson, 49 N. C., 510; *Foundry Co. v. Killian,* 99 N. C., 509.

WILLIAM WALTON v. JACOB and GEORGE FILE.

If one enters into the possession of land under a treaty of purchase with the owner, he becomes a tenant at the will of the owner, and cannot sustain an action of *trespass quare clausum fregit* against such owner, for entering upon the premises without his consent.

TRESPASS QUARE CLAUSUM FREGIT, for entering upon the possession of the plaintiff and cutting and hauling off a quantity of wheat.

Upon the trial at ROWAN, on the last circuit, before his Honor, *Judge Donnell,* the case appeared to be, that the defendant Jacob File had executed a bond to the plaintiff to make him a title thereafter to the *locus in quo,* and at the same time received from the plaintiff the purchase money and delivered him the actual possession of the land. The plaintiff continued in possession and cultivated a part of the land in wheat and corn. At harvest time the defendant Jacob File, together with the other defendant, George File, who had been living on the land and had sown the wheat before the sale to the plaintiff, entered upon the prem- (568) ises, against the plaintiff's consent, and cut and carried away the wheat. Under the instructions of his Honor, a verdict was rendered for the plaintiff, subject to the opinion of the Court upon the question whether the action could be sustained. If the Court should be of opinion for the plaintiff, then judgment was to be rendered for him; if otherwise, a judgment of nonsuit was to be entered. His Honor, *pro forma,* gave a judgment for the plaintiff, and the defendants appealed.

D. F. Caldwell, for the plaintiff, cited and commented on 3 Salk., 354; Wills., 221; 3 Bur., 1563; Vin. Abr., tit. *Tres-*

pass, 440, 441; *Graham v. Peat*, 1 East, 244; *Myrick v. Bishop*, 8 N. C., 485; *Jones v. Taylor*, 12 N. C., 434; *Carson v. Baker*, 15 N. C., 220. He also contended that George File could not justify his entry; and that, as the plea was joint, it being bad for one, was bad for the whole.

Pearson, for the defendant, argued, *contra*, that the plaintiff had no such estate as a *court of law* would take notice of to sustain this action, and referred to *Jones v. Taylor*, 12 N. C., 434.

DANIEL, J. The possession of the plaintiff having been obtained by the license of Jacob File, the *legal owner*, it became a rightful possession. He was tenant, not from year to year, but a tenant at *will*, by implication. This kind of tenancy arises when the party is in possession of the premises with the privity and consent of the owner, no express tenancy having been created and no act having been done by the owner impliedly acknowledging such party as his tenant, as where he has been let into possession pending a treaty of purchase, or is let into possession under an agreement for a lease, he then becomes tenant at will. Adams Ejectment, 103. File could not have maintained an action of ejectment against Walton without having given him reasonable notice to quit, for there is no doubt that an ejectment treats the tenant in possession as a wrong-doer at the time the action is brought.

(569) If he be lawfully in possession then, it is an answer to the action, whatever may be the date of the demise lain in the declaration, for an ejectment is altogether a fictitious remedy. *Doe v. Jackson*, 8 E. C. L., 126. All the authorities cited by the counsel for the plaintiff go no further than to establish the above doctrine. The plaintiff being considered in a court of law the tenant at will of Jacob File, File had a right at his will and pleasure to enter upon his own freehold. 1 Thomas's Coke, 646-648, note d. And in this action of *trespass quare clausum fregit* he and his co-defendant (who entered with his permission) had in law a right to defend themselves under their joint plea of "not guilty." We think the verdict and judgment must be set aside and a judgment of nonsuit entered.

PER CURIAM. Judgment reversed.

Cited: Eaton v. George, 48 N. C., 386.

DEN ex dem. JOHN DOBSON et al. v. WILLIAM W. ERWIN et al.

1. If the defendant in an execution places money in the hands of another person for the purpose of purchasing his own property, at a sale under the execution, with an intent to defraud his creditors, and that person buys it and takes a deed from the sheriff, the defendant is still the owner of it, and another of his judgment creditors may, at law, subject it to the satisfaction of his debt, although the first execution be for a *bona fide* debt, and the sheriff who sold under it is not a party to the fraudulent contrivance of the debtor.

2. The different jurisdictions at law and in equity, for the suppression of fraud, stated by RUFFIN, C. J.

(*McKerall v. Cheek*, 9 N. C., 343; *Vick v. Flowers*, 5 N. C., 321, and *Brady v. Ellison*, 3 N. C., 348, approved).

EJECTMENT, tried at BURKE, on the last circuit, before his Honor, *Judge Strange*.

The plaintiff claimed title to the land described in the declaration under a judgment and execution under which it was sold as the property of one Joseph Dobson in the year 1812. The defendants proved that, previous to that sale, a sale had taken place under another judgment and execution, at which one Nancy Young had purchased and taken a deed from the sheriff for the same land. The plaintiff then proved that at the time the land was sold under (570) the former execution Joseph Dobson was largely indebted and intended to defraud his creditors, but that there was no collusion between him and the sheriff or the plaintiff in that execution, although the money was furnished by Dobson to Nancy Young with which she paid for the land; that Nancy Young was the daughter of Dobson, and subsequently to the sale lived upon the land with him and his family.

Upon this state of facts the defendants contended that they were in law entitled to a verdict, and the plaintiff agreed that the case might be considered as on a motion for a nonsuit, and that the defendant need not bring forward other points and evidence in the cause upon which they relied. His Honor was of opinion that, although in equity Nancy Young might be held a trustee for Joseph Dobson, yet the legal title passed to her, and that there was no interest remaining in Joseph Dobson which could be the subject of sale under exe-

cution previous to the Act of 1812 (Rev., ch. 830). In submission to this opinion the lessors of the plaintiff suffered a nonsuit and appealed.

Badger, for the lessors of the plaintiff: If a man has property liable to execution it cannot be divested but by a *bona fide* application of it to the payment of his debts.

The question here is, how far the common law can prevent fraud. The satisfaction of creditors by execution is derived from common-law principles, and they must be wretchedly defective of such evasions as this can be permitted. The debtor has land and money; and can he, by furnishing another person with his money to buy in the land, exempt it from further executions? But it is said the proper remedy is in equity. There is only one class of cases that requires an application to a court of equity, to-wit, cases of equitable interest. But, to hold that the property of a debtor may be bought in by his own money proves not only that the common law is defective, but that it furnishes a ready means (571) for protecting one's property from payment of his debts.

The Judge, in the present case, was misled by the case of *Guthrie v. Wood*, 2 E. C. L., 430, or rather by the loose expressions of *Lord Ellenborough*, who decided that case. That was the case of a trustee buying in an incumbrance with other funds which he held in his hands belonging to the creditors. He purchased for the benefit of the creditors for whose use he held. He bought with the money of the creditors, and not that of the debtors. His purchase did not give him a title in his own right, but he held as trustee. The question was, whether a trustee had a right to purchase in the legal title for one creditor to give him an advantage over another. In every case where there is any fraud the transaction is void; otherwise, no question could arise at law upon cases of fraudulent sales. The case of *Kidd v. Rawlinson*, 2 Bos. & Pul., 58, and other cases of that kind, could not have arisen at law if fraud drives the party into equity. There is a clear distinction between execution sales and sales between parties. The distinction is, that in execution sales the property has been truly applied in the payment of debts, but if a party sends his money to purchase his own property

the money and not the property has been applied. Here it makes no difference that the sheriff and creditor in the execution were honest. This is not a case for equity. The common law is, or ought to be, adequate to furnish a remedy. The common law is recognized in the Statute of Elizabeth, which makes every act fraudulent where creditors are delayed or hindered.

Pearson, for the defendant: The question is, whether the sheriff's deed transferred the legal title to Nancy Young. Such transactions are governed by the intent with which they are done, and not by the effect which they may produce. *Moore v. Collins,* 14 N. C., 133. The defendant, in an execution giving it a fraudulent effect, cannot avoid the sale. The case of *Meux v. Howell,* 1 East, 1, decides that all the parties must participate in the fraud before the execution can be declared void. The case of *Guthrie v.* (572) *Wood* is relied upon for the defendants.

RUFFIN, C. J. It is yielded in the case stated in the record that the whole of the money paid to the sheriff was the money of Dobson, the debtor in the execution, and that the supposed purchase therewith by the daughter, Nancy Young, and the deed taken by her, was upon a dishonest contrivance between those persons to defeat thereby the father's other creditors. Yet, these facts and intents to the contrary notwithstanding, his Honor declared his opinion to be, that the sale and deed did not only apparently, but really, divest the estate in law out of Joseph Dobson and vest it in his daughter as against the lessors of the plaintiff and the creditors whom they represent. Under that opinion the plaintiff was nonsuited, and appealed.

This Court cannot adopt the opinion of his Honor, but deems it erroneous. It seems to have been founded on the circumstances of the judgment and execution being for a just debt, and the good faith on which the creditor and the sheriff acted. The sheriff is treated as the owner of the land sold, or at least as the authorized vendor making a sale deemed by him to be a true sale at the time, and it is thence inferred that the sale must be valid and his deed effectual.

The Court does not view the subject in that light. We think the sale and conveyance to Nancy Young fraudulent and void within the Act of 1715. In terms, that statute includes suits, judgments and executions, as well as feoffments, gifts, grants and other alienations and conveyances. The spirit and true construction of it extends to every possible art and device by which a debtor aims to pass the title of his property from himself to another, to the intent to defeat or hinder his creditor. The intervention of the process of the law, at the instance of a creditor who is innocent of the guilty scheme and ignorant that he is made subservient to its execution, cannot protect the intents on which the other parties acted from investigation, nor confirm those parts of the transaction by which those parties would reserve
(573) or acquire valuable interests. The creditor stands on his good faith; but the others cannot involve his innocence to purge their bad faith or to conceal it. The creditor was entitled to his own debt. He received the money and may retain it. The payment was right and is valid. But "every act, as well judicial as others, which of themselves are just and lawful, being mixed with fraud and deceit, are, in judgment of law, wrongful and unlawful." *Fermor's case*, 3 Rep., 77. And "a fraudulent estate" (gained by one thus mixing fraud with what would be otherwise right) "is no estate, in the judgment of law." In the case before us, what did the law and justice demand? That the debtor should pay the debt, and, if he could not or would not, that the sheriff should make it of his estate by sale. In fact, the debt was paid. By whom? By the debtor, through the hands of his daughter, with the debtor's own money. That is the reality of the case, and, thus far being fair and proper, it stands. When the debtor and his daughter endeavor to give that reality the appearance of another thing—namely, that the debt was not paid by the debtor and with his money, but was paid by the daughter and with her money, advanced as the price of the land exposed to sale—they introduce falsehood and an injurious deception into the title set up by the daughter, which vitiates it. That part of the apparent transaction is delusive. As the money was the father's, and not the daughter's, there was in truth no price and no sale as between the father and daughter. The sale which the credi-

tor and sheriff thought they were making was a mere fiction, and the mistake of those persons cannot impart to it actual existence. It assumed, indeed, the form of a legal sale and conveyance by the sheriff. But if the sheriff had known the truth he would not have been obliged and could not justly and lawfully have made the deed. He also was imposed on; and surely the authors of that deception cannot adduce it as a screen from animadversion by other persons on whom the artifice, if successful, operates still more injuriously. That a deed obtained from a sheriff by deceit is not good and may be impeached at law was decided in *McKerall v. Cheek*, 9 N. C., 343. But this case need not be put (574) on that point. It rests upon the solid ground that, notwithstanding the form which it took, there was in fact and in truth no sale, and consequently the sheriff had no authority to convey. It is a flagrant attempt to disguise, under the form of a sale by the law, an arrangement of the debtor's property, made by himself for his own benefit, or, without any consideration, for the benefit of his child, to the disappointment of his creditors. It is a perversion of the process of the law to a purpose not intended by the law, but forbidden alike by it and by common honesty—the making a sale under it to raise money which the debtor already had, which he had intended to apply and which he did apply to the satisfaction of that very debt. The law would be false to itself if the substance of such a transaction could be secured from scrutiny by the shell of mere form, if it treated as a sale made by its officer under its authority that which is under the garb of such a sale so palpably a voluntary disposition by the debtor himself, upon premeditated and preconcerted fraud between him and the pretended purchaser.

The correctness of the foregoing general observations seems to us to be incontrovertible. If so, they must, we think, remove the difficulty which was felt in the Superior Court. Whatever may be the effect as between themselves, or those claiming under them by contract, of the form imparted by the debtor and his accomplice to the transaction, the law characterizes it as "feigned, covetous and fraudulent" in respect of creditors, and enacts that it shall be "utterly void, frustrate and of no effect—*the pretense, color and feigned consideration to the contrary notwithstanding.*" This principle

being enacted by statute, and the subject of the controversy being whether an instrument which purports to pass the legal estate from the debtor which was before in him is valid or void, as being without or within the rule thus created, it seems to us to be essentially and necessarily within the jurisdiction of a court of law to examine into the consideration and purposes of the conveyance, and if they should be found to be (575) those forbidden by the statute, to apply and enforce its enactments. This we had considered as settled law. The position laid down by his Honor implies that such a conveyance is necessarily valid at law, notwithstanding the intent stated, because a trust arose between the parties which could be enforced in equity, and can be enforced there only.

If there be a trust, the change of the jurisdiction must be acknowledged. But that takes for granted the very question in dispute, which is, whether the daughter gained any estate out of which a trust could arise. That depends on the validity of the deed to her, and that, again, upon the intent and purpose on which she took it, into which it is competent to a court of law to inquire. Taking it for granted, as was done in this case, that the intent was to deceive creditors, and that the money paid was the father's, yet the sale and deed are binding between the father and daughter, both at law and in equity. The statute is express to that effect, and they are conclusive at law. It has likewise been long and uniformly held that equity will not interfere between persons *in pari delicto,* nor enforce between the parties a secret trust arising out of a deed in fraud of creditors. *Vick v. Flowers,* 5 N. C., 321; *Brady v. Ellison,* 3 N. C., 348. The debtor himself, then, could not claim a reconveyance upon the foot of such a trust. It is not deemed a valid trust, fit to be executed in a court of equity. For the same reason, one claiming as a creditor of the debtor could not insist on it by way of affirming the alleged agreement and asking the execution of the trust. The Court does not recognize any such trust for the purpose of enforcing it as such in favor of any person, because, if it existed, it is covinous and avoids the deed itself. A creditor cannot therefore be relieved upon a bill which supposes the existence and validity of such a trust. If, indeed, there were a trust, which, as such, could be sustained in equity, it would be decisive of this question, be-

cause, of a trust, independent of the Act of 1812 (Rev., ch. 830), the law takes no notice. So, on the other hand, if, as we think clear, there be no such trust, and relief in equity would be founded not on it, but on a ground entirely different—namely, the fraudulent intent to withdraw (576) the debtor's estate from his creditors—the conclusion seems to be equally reasonable and certain that the jurisdiction is appropriately at law, and, if not exclusive, is at the least concurrent with that in equity.

It is not doubted that equity may relieve against fraud. It is admitted that against many frauds redress can be had there only. In respect to that species now under consideration against creditors, resort before the statute was necessarily had to equity to get at property of which the legal title was never in the debtor, or such as is not tangible and in the hands of another person to the intent to withdraw it from creditors, or in a way that produces that effect. It is likewise a common equity in favor of a judgment creditor who cannot otherwise obtain satisfaction by execution to file a bill against the debtor and his alienee, alleging a fraud in the conveyance and seeking a discovery of it from the defendants, and a declaration of it by the court, and relief by a decree for bringing the estate to sale cleared of the cloud on the title. That is a subsidiary jurisdiction not superseding that of a court of law, but rendering its process more effectual. A purchaser at sheriff's sale may also, in many, and perhaps in all cases, pursue his remedy in equity, and that not only to perpetuate evidence of the fraud, but to have discovery and relief against it. An example may be stated in a purchase under execution against the *cestui que trust,* under the Act of 1812, which does not oust the previous jurisdiction, though it treats the keeping the legal estate outstanding in a trustee as a *quasi* fraud in the owner, and avoids the legal estate of the trustee. Another exists when the estate of the debtor was under a previous *bona fide* lease for a term not expired, or was originally a reversion not yet fallen in, in which the fraud is not susceptible of immediate determination in ejectment because the purchaser has no present right of entry. It has been questioned and earnestly debated, whether a bill will lie by a purchaser under execution of an estate in possession or in which he got a right of entry, pro-

vided the opposing title be fraudulent; the objection being, that the plaintiff might go to law. The authorities (577) do not put that point to perfect rest. The better opinion, however, seems to be that in cases of mere constructive fraud, and where the motives were honest and the consideration meritorious, though not valuable, the Chancellor will leave the party to his legal remedy, according to the strict law; but that in all cases of actual fraud, equity will set aside the conveyance, though the plaintiff might maintain ejectment and recover the possession. *Bennett v. Musgrove,* 2 Ves., 51. The very terms in which this rule is stated admit the jurisdiction of a court of law. The relief in equity is different and may be more beneficial than that given by the law. But the jurisdiction there is not assumed upon the ground either that the subject is appropriate to the court of equity as a court of peculiar jurisdiction, or because that court proceeds upon an interpretation of the statute distinct and different from that given at law, placed on it in equity on a principle peculiar to itself, whereby the meaning of the law-giver is supposed to be more truly discovered and upheld. On the contrary, it is entertained in equity, notwithstanding it exists in a court of law, and thus entertained because such deceitful practices, dishonest in their concoction, progress and consummation, are so abhorrent to every tribunal of justice, that every tribunal hath authority and is bound to relieve against them according to their respective capacities and methods of proceeding, and because the relief peculiar to the court of equity, being final and conclusive, is more perfect than at law.

Admitting, then, that the lessors of the plaintiff might have a decree in equity, which we do not undertake to determine, yet it does not follow that this action may not be maintained. This is not the case of a *bona fide* trust for the debtor which a creditor is seeking to reach. For the reasons already given, there is no trust at all, judicially speaking, it lying altogether in personal confidence and being infected with a turpitude common to both parties, for which equity would repel the application of either. It may be here remarked, in passing, that if there were a trust such as equity would support, that Court could not help the lessors of the plaintiff more than a court of law could; for, although

the judgment creditor might have filed his bill for a (578) sale under a decree, yet he could not sell under a *fieri facias,* as a trust was not the subject of execution before 1812, and consequently the lessors of the plaintiff gained nothing by their purchase. The supposed relief in equity, not arising out of the jurisdiction of trusts, must therefore proceed on the ground of the fraud—that is, on the statute, which is construed alike in both courts. While, then, each court may give a different relief, it is thus seen that the rights of the parties depend in both upon the same questions, and that they are essentially questions of law. They depend upon the judgment pronounced by the statute upon the intents of those acts of the parties under which Mrs. Young sets up title. If fair and honest, her estate is good, both at law and in equity; if covinous, it is "no estate, in judgment of law," nor in equity.

There is nothing in this case to prevent the trial of those questions at law. There is no subsisting term to stand in the way of the plaintiff's entry. The estate of the debtor is not an interest originally acquired by him as a trust, upon a conveyance from a third person to his daughter as his trustee. But the estate was at one time in the debtor himself, and the daughter claims under several acts and instruments; all together, however, constituting but one assurance which purports to pass the estate of the father out of him to her. We cannot conceive a case proper for a court of law if this be not. The whole controversy is as to the intent on which the father's estate was parted with, and, as to that, the conveyance, no matter what its form, is not conclusive, but it may be proved *aliunde.* As the estate of the father was a legal one, and if there was fraud that estate still subsists unchanged; there must be a legal jurisdiction. We are not aware of any principle or adjudication in conflict with this course of reasoning.

It has been supposed at the bar that a distinction arises between a conveyance directly from the father and one from the sheriff. It is imperceptible to the Court. In reality, the conveyance is from the father, indirectly through the sheriff. It gives to the dealing the semblance of (579) fairness, but nothing more than the semblance. It does not make it fair, though it increases the difficulty of

detecting its unfairness, but, when detected, that avoids this, as well as all other instruments, however solemn. There are numerous cases in the books which clearly evince that no such potent efficacy is allowed to a sheriff's sale. Of this class, *Kidd v. Rawlinson*, 2 Bos. & Pul., 59, is a leading one. The plaintiff purchased goods at the sale of a sheriff under execution, at the suit of another creditor, and left them with the former owner. The defendant afterwards sold them, and the plaintiff brought his action for the produce of the sale, as money had and received. Upon the authority of *Edwards v. Harben*, 2 Term, 587, it was contended that the plaintiff's title was fraudulent and void because the possession did not accompany the title. The ready answer, if the doctrine now contended for be true, would have been that the sheriff's bill of sale was conclusive as to the legal title, and that it could be impeached in equity only. But that was not the one given; so far from it, the Court said the open sale upon execution, and the purchase by the plaintiff, not in satisfaction of a prior debt to himself, but for money paid by him, took the case out of the rule in *Edwards v. Harben* and prevented the possession constituting, *per se*, a fraud. The case, however, was not for that reason allowed to rest there. *Lord Eldon*, who was then Chief Justice, put it further to the jury to say whether the plaintiff purchased the goods with the intent of defeating any creditor of the former owner, the debtor. Upon a motion in bank for a new trial, that direction was approved by *Lord Eldon*, on reconsideration, and by the other Judges. It is obvious that the plaintiff's right to recover in that case was made to depend, not upon the fact that he derived title under execution at the instance of another person, and that the creditor and sheriff acted upon upright intentions, but upon the other facts, that he paid his own money and purchased with good faith on his part, and took the bill of sale to secure himself and not to defeat a creditor.

There are many other cases of actions against sheriffs for false returns because they did not sell property which
(580) they had before sold under other executions, or for selling such property a second time; in none of which has the first sale been received as a conclusive bar, *per se*, at law; but the trials have proceeded on the inquiry in each of

them into the good or bad faith of the purchase under execution.

The case of *Guthrie v. Wood* was relied on at the bar as an instance to the contrary, and it was admitted by the counsel that it was the only one, apparently of that tendency, that could be cited. The Court cannot understand that case in the sense attributed to it, nor give it the application contended for. It seems to us to establish the principle we have already laid down. A debtor there made an assignment to a trustee for the payment of debts, which was not impeached. At the time there were demands against the assignor, by executions and otherwise, which constituted liens on the goods, and, under an execution, the sheriff put up the effects for sale, and the trustee, with a part of the trust money, purchased them and left them with his assignor for a short time. A creditor having a junior lien claimed to be satisfied out of the same goods; and the sole question was, whether he had the right, upon these facts by themselves, and without any dishonest intent in the creditor, the sheriff, or the purchaser at the first sale. It was very properly, as we think, held that he had not. But it was not upon the ground that the purchaser was amenable only in equity, even if he had bought with the debtor's money. On the contrary, it was because the money was not the debtor's and the intent honest and lawful. If the assignment had been in trust for the donor, or the value of the effects had so greatly exceeded the debts secured as to show that the security of the creditors was colorable, the purchase would doubtless have been held fraudulent. But, in truth, the case was nothing more nor less than that of an assignee in trust, not for the assignor, but for just creditors, buying with a part of the trust fund, on which there was no lien, other parts on which there were a prior and posterior lien. The preferable lien was entitled to the first satisfaction, and a sale under it passed the property necessarily freed from the other. If the sale was fair and open, it was (581) the business of him who had the junior lien to see that the sale produced enough to satisfy both, or else he must lose the benefit of his own. The trustee, as against him, might buy as any other person. He owed no duty to him which obliged him to render that lien effective, but he did owe the duty to his *cestui que trusts* to prevent, if he could,

any sacrifice of the effects and to extinguish all liens on them at as little cost as fairly he could. He meditated no fraud on the creditor, and did not buy for the debtor's benefit, nor with his means. He purchased with money legally his own, but equitably that of the creditors for whom he was trustee and to whose use his purchase enured. The purchase was protected, not because any bad faith that might have entered into it was not examinable at law, but only in equity, but because there was no bad faith, and therefore the transaction ought to stand, both at law and in equity. The case was decided on its merits, and not on the form of the title or of proceeding.

In the opinion of the Court, the remedy at law is open to the plaintiff, and the case stated constitutes a flagrant fraud, which entitles the plaintiff to a verdict. The intent is stated as a fact, as is also that the whole price paid by the daughter was in the father's money. Either of those facts is destructive of her title.

The Court must not be understood as laying it down that a person cannot advance money by agreement with a defendant in execution to satisfy the debt, but that the sheriff shall proceed to a sale and the advance be made as upon a purchase at the sale. We have no doubt of the affirmative. The whole is then done in good faith, and the conveyance is taken honestly as a security for the money then advanced, with a trust resulting, of course, to the former owner. Nor do we think the case necessarily different if a part of the debt be advanced by the debtor's friend and the rest by the debtor himself. Such a case depends on the actual intent. If there be no falsehood, but open dealing, and the funds of the debtor being insufficient, a sale is necessary at all events, the lender may properly purchase and take a deed to
(582) secure his demands. Such was the case of *Hawkins v. Sneed,* 3 Hawks., 149. But if there be actual fraud -if the purchaser, with the debtor's money in his hands nearly to the amount of the debt, buys, paying only a small proportion of his own, and by collusion with the debtor takes a deed with the intent to claim the estate absolutely against other creditors, his own advance could be made but to give color to the transaction, and could not rescue it from the legal

consequences of the corrupt combination supposed. The judgment must be reversed and a new trial ordered.

PER CURIAM. Judgment reversed.

Cited: Gowing v. Rich, 23 N. C., 559; *Morris v. Allen,* 32 N. C., 207; *Page v. Goodman,* 43 N. C., 20; *Jimmerson v. Duncan,* 48 N. C., 538; *Gentry v. Harper,* 55 N. C., 178; *Taylor v. Dawson,* 56 N. C., 90, 92; *Perry v. Yarbrough, Id.,* 68; *Black v. Justice,* 86 N. C., 512; *Woodley v. Hassell,* 94 N. C., 161; *Efland v. Efland,* 96 N. C., 494; *Thurber v. LaRoque,* 105 N. C., 319; *Guthrie v. Bacon,* 107 N. C., 338; *Osborne v. Wilkes,* 108 N. C., 676.

DEN ex dem. WILLIAM T. SUTTON et al. v. JOHN A. SUTTON.

The deed of a *feme covert* is void at common law, and can only be effectual when taken according to the Acts of 1715 and 1750 (Rev., chs. 3 and 50). By those acts the deed is to be first proved as to both husband and wife, and then her private examination is to be had either by a Judge or in the County Court; and when her examination preceded the probate, the deed was held to be inoperative.

EJECTMENT, upon the trial of which, at BERTIE, on the last circuit, before his Honor, *Judge Dick,* the jury returned a special verdict, the material facts of which were as follows: Mary Sutton was seized in fee of the lands described in the plaintiff's declaration when she intermarried with John E. Wood. On 19 June, 1821, the said Mary, with her husband, executed and delivered to one Joseph S. Pugh a deed intended to convey, and expressed in apt and sufficient words to convey, and which did convey, the said lands in fee simple to the said Pugh, if the said deed was sufficiently proved and authenticated to operate in law upon the estate of the said Mary in the said lands. The said deed was attested by three subscribing witnesses, and upon it appeared the following endorsements: 1. An affidavit before the Clerk of the Superior Court of law for Bertie County, made by the attending physician of the said Mary, certifying that she was

(583) "so indisposed, weak and infirm of body and health as to be utterly incapable to travel to any one of the Judges of the Supreme Court or Judges of the Superior Courts of law and equity of the said State to be privately examined," etc. 2. An order from one of the Judges of the Superior Courts of law and equity to the Clerk of the Court of Pleas and Quarter Sessions for Bertie County, commanding him "to issue a commission to two or more persons properly qualified, empowering them, according to the form prescribed by law, to take the examination of the said Mary," etc. 3. The commission issued by the clerk in pursuance of the above order. 4. The return made by the commissioners, that they had "attended and taken the private examination of Mrs. Mary Wood, wife of John E. Wood, touching and concerning her having executed the within deed to Joseph S. Pugh, and upon the examination of the said Mary Wood, privately and apart from her husband, the said John E. Wood, we find that the said Mary Wood executed the said conveyance freely," etc. All the above endorsements bear date in June, 1821. The fifth bore date of August Term, 1821, Bertie County Court, and was in the following words: "This deed from John E. Wood and his wife Mary to Joseph S. Pugh, with the commission and private examination of the said Mary, was returned to this Court and ordered to be registered. E. A. Rhodes, Clerk." A sixth endorsement, bearing date at Bertie County Court, November Term, 1835, was in the words and figures following: "This deed, from John E. Wood and Mary, his wife, to Joseph S. Pugh, was proved in open court by the oath of William Morning, the subscribing witness thereto, and ordered to be registered. John S. Taylor, Clerk." On 18 October, 1821, Joseph S. Pugh executed and delivered to John E. Wood a deed for the same lands. Mary Wood died in 1822; and the lessors of the plaintiff are her heirs at law. John E. Wood died in 1834, leaving the defendant one of his heirs at law, who was in possession of the premises described in the declaration at the commencement of the suit. His Honor being of opin-

(584) ion that the deed from John E. Wood and his wife, Mary, to Joseph S. Pugh, was not executed in due form of law to pass the lands therein mentioned to the said

Joseph, directed judgment to be entered upon the verdict for the plaintiff; and the defendant appealed.

Iredell and *Badger,* for the defendant, contended: That it was sufficient for the transfer of the wife's estate, if all were done which the law required, notwithstanding it were not done in the order of time specified; that the law required the wife's interest to be protected, and if it appeared that such had been done, it was sufficient. They then endeavored to distinguish this case from that of *Burges v. Wilson,* 13 N. C., 306.

Kinney, for the plaintiff, argued: That the affidavit upon which the order of the Judge was made, was insufficient, as it only stated the inability of the wife to travel to one of the Judges of the Supreme or Superior Courts, and not also to the court of the county where the land was situate. He also contended that the deed of a *feme covert* was void at common law, and the statute giving the authority to make a deed must be construed strictly.

GASTON, J. This Court approves of the decision made in the Superior Court, that the deed set forth in the special verdict as executed by John E. Wood and wife Mary, to Joseph S. Pugh, was not executed in due form of law to pass the estate of Mary Wood. A *feme covert* has no capacity at common law to make a deed, and an instrument purporting to be such is void, unless it be accompanied by the ceremonies prescribed by our acts of Assembly authorizing *femes covert* to convey land. It is unnecessary to inquire whether the provisions therein made for the protection of the wife are effectual or not. The courts of justice are bound to support them, and dare not substitute other provisions in their stead. Under these acts the private examination of the married woman, and her acknowledgment of the voluntary execution of, or voluntary assent to the deed, is indispensable. The examination must ordinarily be had before a Judge, or in the Court of Pleas and Quarter Sessions of the county. This authority of the Judge or the Court cannot be dele- (585) gated at pleasure. In certain defined cases, however, the acts authorize a commission to issue, and when such

a commission has regularly issued, an examination before the commissioners, regularly taken, certified, and returned, has then the efficacy of an examination before the Judge or in open court. These cases are, when the conveyance shall have been acknowledged by the husband or proved by the oath of one or more witnesses, before the Judge or the County Court, and it shall be represented to the Judge of the Court that the wife is a resident of another county, or so infirm or aged that she cannot travel to the Judge or County Court to make her acknowledgment. We do not assent to the argument that the case of infirmity must be such as to disable her as well from traveling to the court as to the Judge. The acts authorize a personal examination before the Judge or the Court, and authorize either the Judge or the Court, when the infirmity is such as to forbid such a personal examination, to cause the same to be done by a commission. But we cannot get over the objection that no power is conferred on either the Judge or the Court to order a commission, until the conveyance has *first* been acknowledged by the husband, or proved by the oath of one or more witnesses. The language of the statutes is plain, and it is our duty to give full effect to it. The judgment below is affirmed.

PER CURIAM. Judgment affirmed.

Cited: Joyner v. Faulcon, 37 N. C., 391; *Wynne v. Small,* 102 N. C., 136.

(586)

DEN ex dem. JOHN DOBSON v. WILLIAM MURPHY.

1. A memorandum signed by a deputy sheriff, setting forth that he had, at the request of the sheriff, sold a certain tract of land at a particular time upon a certain execution, is not admissible as evidence of the sale, nor of any other fact, unless he is dead. But upon a question whether the sheriff's deed, purporting to be executed in pursuance of such sale, was fraudulent, it may be admitted for the purpose of showing merely upon what information the sheriff proceeded to execute a deed for land which he had not himself sold.

2. A sheriff's deed fairly executed at any time after the sale has relation to the sale, and operates to pass the title from that time. And if everything else be regular and fair, the law will raise no presumption of fraud against the deed merely because it may be ante-dated to the time of the sale.

3. According to the English rule, a vendee under the sheriff, when a stranger to the suit in which the execution issues, is not obliged to show a judgment, but only the execution; but if the vendee be the plaintiff in the suit, he must also show a judgment. But in this State a purchaser at an execution sale must show a judgment as well as an execution: and if the execution be not warranted by the judgment, the sale will not avail to pass the title.

4. To constitute color of title, there must be some written document of title *professing* to pass the land, which is not so obviously defective that it could not have misled a man of ordinary capacity. Hence, a sheriff's return of a sale upon a *fi. fa.* is not color of title, for that is not understood by any man of ordinary capacity as either passing or professing to pass a title.

EJECTMENT, tried at BURKE, on the Spring Circuit of 1835, before his Honor, *Judge Settle.*

Both parties claimed under one Joseph Dobson, the father of the lessor of the plaintiff; and the plaintiff having made out his case, the defendant set up title under a judgment and execution against Joseph Dobson, and a sheriff's deed for the land in controversy. The judgment given in evidence was rendered at April Term, 1809, of Burke County Court, in favor of one Robert Williamson, for the sum of sixty-six pounds and costs. An execution issuing thereon, and corresponding therewith, was then shown, bearing teste of July Term, 1809, on which there was a return by the sheriff, that the sum of ten pounds had been raised by a sale to William Murphy. Another execution, being the one under which it was alleged, the land in controversy was sold (587)

to the defendant, was then shown, tested of July Term, 1810, for the sum of "sixty-seven pounds, three shillings and sixpence, a balance of judgment, and three shillings and ninepence for costs." On the last execution was an endorsement of a levy by the sheriff, and of a sale, in the following words: "The above mentioned land, sold on 28 Oct., 1810, or all Joseph Dobson's claim to the same—highest bidder, William Murphy. E. Sharpe, D. S." A certificate of the sale, signed by Sharpe, who was a regular deputy of the sheriff, was given to the defendant, in the following words: "This is to certify, that I sold to William Murphy a tract of land of one hundred acres, lying on the creek joining Seth Hyatt and Joseph Dobson, including John Montgomery's old mill place, sold at the suit of Robert Williamson to the use of William Murphy v. Joseph Dobson, sold at the October Court, 1810." It was proved by Raburn, the sheriff, that he was not present at the sale; that after making the levy, he placed the execution in the hands of Sharpe, his deputy, and upon his return, after a short absence, from the country, received from the defendant the certificate, which he knew to be in the handwriting of his deputy, and promised the defendant that he would make him a deed, but neglected to do so until many years afterwards. This certificate was objected to by the plantiff's counsel, as nothing more than a naked statement by Sharpe in writing, but was received by the Court, upon the sheriff's swearing that he received and recognized it as the act of his deputy; it was further objected to, because the sheriff's recognition could not be by parol, but this objection was also overruled. A deed from the sheriff, bearing date 28 October, 1810, and reciting an "execution issuing from the Court of Burke County, against Joseph Dobson, Sr., for the sum of twenty dollars, that Robert Williams received, etc."; and also that he, the sheriff, "did seize and sell the land, etc.," was then given in evidence by the defendant. Upon this, the plaintiff proved by the subscribing witness to the deed, that it was executed some short time before Christmas, in the year 1827; that Raburn and one Sherrill, the son-in-law of the defendant, and
(588) tenant in possession, came to his house and desired him to witness the deed; that he expressed a wish to read it over, but Raburn said it was a sheriff's deed that he ought

to have made long ago, as Sheriff of Burke County, but said nothing about its being antedated; and that he, the witness, attested it without knowing the date; and that all this took place in Haywood County, where Raburn then resided. The defendant then proved by Raburn, that at the time of the execution of the deed, he was called upon by Sherrill, as agent of the defendant, to make it; that he had before him the certificate above referred to; that he thought it was right to date the deed at the time it ought to have been made; and that he handed over the certificate to be kept with the deed, as in explanation of its date; he further swore that he executed the deed as sheriff, by virtue, and in pursuance of the sale that had been made, under the judgment and execution above referred to, and that he had recognized the act of his deputy. This deed was objected to as improper evidence, because it did not appear on its face to be made in pursuance of the sale under the judgment and execution above mentioned; and because it was procured to be antedated by the defendant or his agent *mala fide,* and could not therefore be set up so as to relate to, and make the title good from, the sale. The defendant proved further, that he had been in the adverse possession of the land from the year 1815, more than seven years before the bringing of the suit.

Upon this evidence the defendant insisted: 1. That he had made out a good and valid title. 2. If the sheriff's deed should not be considered good to pass the title, yet his title was valid, by his possession under color of title, and that he had color of title, either by the levy, sale, return of sale, and certificate above mentioned, or by the relation of the sheriff's deed. His Honor instructed the jury, "that it was a general rule, that deeds took effect only from the delivery, but that in the case of a sheriff's deed, where the lands were fairly and honestly sold by him, or his legal deputy, under a valid judgment and execution; and a deed was fairly and honestly executed by the sheriff, in pursuance of such sale, the deed had relation to and passed the title from the sale, (589) and might, therefore, be said to take effect from the the sale." It was then left to the jury to ascertain from the evidence, whether the sale of the land was fairly and honestly made or not; or whether the deed executed by the sheriff to the defendant was fairly and honestly, or fraudulently done,

with instructions, that if they were of opinion that either the sale or execution of the deed was fraudulent, the purchaser acquired no title under them. He further instructed the jury, "that the endorsement made by the sheriff of his levy, and the endorsement made by his deputy, of the sale under the execution, were color of title from the time the sheriff recognized the sale and returns of his deputy"; and it was left to them to say, whether the sheriff did recognize the sale and return of his deputy, and when. His Honor also charged, "that a sheriff's deed, void for irregularity, did not have relation to the sheriff's sale as color of title." The defendant had a verdict and judgment, and the lessor of the plaintiff appealed.

D. F. Caldwell and *Devereux,* for the plaintiff.
Pearson, for the defendant.

GASTON, J. The first question in this case arises on the admissibility of certain testimony. The defendant offered in evidence a paper-writing signed by E. Sharpe, deputy sheriff, setting forth that at the October Court, 1810, at the request of the sheriff, he had sold to the defendant the tract of land in controversy on an execution, at the instance of Robert Williamson, to the use of the defendant, against Joseph Dobson. The plaintiff objected to the reception of this instrument as evidence, but the Court, nevertheless, admitted it. The record does not show distinctly the purpose for which the evidence was offered. It seems to us, that it was not proper evidence of the fact of the sale, or of the truth of any of the matters therein declared. Offered for any such purpose, it conflicts with the general rule, that the oral or written assertion of no man is evidence of the truth of the fact asserted; and it is not brought within the range
(590) of any of the exceptions to that rule, which necessity or policy has established. If it had appeared that Sharpe was dead, then it might have been admitted as the declaration of a fact, in the regular course of business, by one who possessed peculiar means of knowing the fact, and who labored under no temptation, bias or influence, to misrepresent it. But as the case does not state that Sharpe was dead, we must suppose him alive; and surely his declara-

tion on oath in open court, in regard to the fact of the sale, was greatly to be preferred to any certificate he had given about it. This writing was not in the nature of any of those formal and authentic testimonials, made by persons entrusted with public authority; which, to the extent of that authority, are viewed by the law as public documents, and are evidence, more or less conclusive *against all,* of the matters thereby certified. It is not an act purporting to be official, like a return upon a writ, and if it were, the sheriff's deputy is not known to the law as a public officer. *Holding v. Holding,* 4 N. C., 324; *McMurphey v. Campbell,* 2 N. C., 181; *State v. Johnson, Ibid.,* 294. We think, however, that it was admissible testimony, merely to show upon what information the sheriff proceeded to execute a deed for land which he had not personally sold; and as thus throwing light on a matter which was greatly disputed—the good or bad faith of that transaction; and that being admissible for that purpose *only,* the jury should have been instructed not to regard it as evidence for any other. The case does not show that any instruction was prayed for, in regard to the effect of this evidence, nor state what instruction, in fact, was given respecting it. If there had been cause of exception to the charge of the Court, in relation to this matter, it should have been taken. Although *apprehensive* that it may have been used for a purpose not legitimate we cannot hold for error its mere reception.

The plaintiff has no just cause of complaint against that part of the Judge's instruction which advised the jury, that where a sale is made under a valid judgment and execution, and a deed is subsequently executed, and such a sale and deed are fair, the deed has relation back to the sale, and operates to pass the title from that time. We con- (591) sider this as unquestionable; and if every thing else be regular and fair, we think the law raises no presumption of fraud against the deed merely because it bore date as of the time of the sale. It is certainly most correct, that all instruments should correspond with the precise facts of the transaction, which they testify, as far as legal forms will permit; and the antedating of a deed, which operates from its *delivery,* is a circumstance well warranting a suspicion of unfair intent. But the sheriff's deed, in this case—suppos-

ing the judgment and execution valid, and the sale fair—would operate alike from the sale, whatever the date given to it, and whether made by him in office or out of office. But however unexceptionable this part of the instruction may be, the facts did not warrant a verdict for the defendant, unless his title was perfected by possession. The judgment and execution are set forth and the execution is not supported by the judgment. We understand the English rule to be, that a vendee under the sheriff, when a stranger to the suit in which the execution issued, is not obliged to show a judgment, but obtains a sufficient title under the execution (*Batten v. Murless,* Sel., 110); but that if the vendee be the plaintiff in the suit, he must also show a judgment. *Bland v. Smith,* 2 Stark. Cas., 199; 3 E. C. L., 312; *Burton v. Cole,* Car., 443. In this State, however, it has long been settled that a purchaser at an execution sale must show a judgment as well as an execution. Unless the execution be warranted by a judgment it will protect the officer but will not avail to operate a transfer of the defendant's property. The judgment offered in evidence was rendered at the April Term, 1809, of Burke County Court, for the sum of sixty-six pounds, and costs. An execution is shown, corresponding with this judgment, tested of the July Term, 1809, on which there is a return by the sheriff, that the sum of ten pounds has been raised by a sale to William Murphy; and then is shown the execution under which it is alleged the sale of the land in controversy was made to the defendant, tested of the July Term, 1810, for the sum
(592) of "sixty-seven pounds, three shillings and sixpence, a balance of judgment, and three shillings and ninepence for costs." A judgment for sixty-six pounds gives no more validity to an execution for sixty-seven pounds, three shillings and sixpence, than a judgment for sixpence to an execution for a thousand pounds. As the verdict for the defendant would be against law, if founded on this part of the case, we must presume that it was rendered for him, in conformity to the Judge's instructions on the effect of his continued possession. This imposes on us the necessity of examining the correctness of his Honor's charge in relation thereto.

On this point the Judge charged, that the return made by the sheriff of his levy, and the indorsement made by his

deputy of the sale under execution, were a "color of title," from the time the sheriff recognized the sale as his; and further, that the sheriff's deed, if void for irregularity, *did* not have relation back to the sale to constitute color of title. This Court is of opinion, that in the first part of this instruction there is error.

One of the members of the Court, the Chief Justice, yields to this opinion with much hesitation. He is disposed to hold that any written evidence, accompanying a possession, showing the character of that possession to be adverse, and on a claim of title, indicates a sufficient color of title under the Act of 1715. But the other members of the Court are satisfied that at this day it is not permitted to give such a liberal interpretation to the act. They believe that it would be at variance with the spirit, if not the letter of numerous adjudications. These seem to have settled that no claim of a title set up under the alienation of another is sufficient to warrant the claimant in alleging that he settled upon the land under a color of title, with a fair expectation of enjoying it, as his own, unless it be made to appear that he had some written document of title, *professing to pass the land,* and one not so obviously defective that it could not have misled a man of ordinary capacity. Such was decidedly the opinion of the late *Chief Justice Henderson,* on the second hearing of *Tate v. Southard,* 10 N. C., 119, although he had intimated in the former hearing, what we are not aware had been intimated by any other Judge, that possibly (593) a sheriff's return of a sale on a *fi. fa.* might be sufficient color of title. We hold it clear, that such a return does not profess to pass a title and is not understood by any man of ordinary capacity as either passing, or professing to pass, a title. Not feeling entire confidence that his impression could be reconciled with the adjudications and expressed opinions of our predecessors, and joining in the anxious wish that, so far as any precision has been given to this perplexing subject, it may be preserved inviolate, our brother *Ruffin* does not press this hesitation to the length of a dissent. And the judgment on this, as on all the other parts of the case, is unanimous. We are not certain that we correctly apprehend the meaning of the Judge in the last part of the charge, wherein he denies any efficacy by relation to a sheriff's deed

if "void for irregularity." We are not aware of any irregularity attributed to it other than fraud, and we decidedly hold, that if, in truth, it were fraudulent, that is to say, did not evidence an actual sale under an execution, it could not be connected with that execution. But if there was an execution which gave power to the sheriff to make a levy on the land in question, and if, under that execution, a fair sale was made by authority of the sheriff, and the purpose of the deed is to authenticate that transaction, then we hold that the sheriff's deed is but the consummating ceremony of that transaction, and makes it operate as from the sale, whether it thereby, in law, transfers, or only professes to transfer, the title in the thing sold. It is like a bargain and sale, which must be enrolled before it can have any efficacy, but if enrolled in due time, gives title or color of title, as the case may be, from the time of its execution.

The judgment must be reversed, because of misdirection with respect to profession and color of title, and a new trial had below.

PER CURIAM. Judgment reversed.

Cited: Festerman v. Poe, 19 N. C., 105; *Blanchard v. Blanchard,* 25 N. C., 107; *Presnell v. Ramsour,* 30 N. C., 507; *Collais v. McLeod, Id.,* 223; *Fleming v. Dayton, Id.,* 455; *Rutherford v. Rayburn,* 32 N. C., 145; *Comrs. v. Duncan,* 46 N. C., 241; *Richardson v. Thornton,* 52 N. C., 460; *Kron v. Hinson,* 53 N. C., 348; *McConnell v. McConnell,* 64 N. C., 344; *Woodley v. Gilliam,* 67 N. C., 239; *McArtan v. McLaughlin,* 88 N. C., 394; *Cowles v. Coffey, Id.,* 343; *Keener v. Goodson,* 89 N. C., 277; *Brickhouse v. Sutton,* 99 N. C., 109; *Ellington v. Ellington,* 103 N. C., 58; *Avent v. Arrington,* 105 N. C., 390; *Neal v. Nelson,* 117 N. C., 402; *Barker v. R. R.,* 125 N. C., 601.

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WILLIAM NOLAND v. RUSSELL McCRACKEN.

Instruction to a jury that they were bound to believe a witness who was uncontradicted and unimpeached, whose story was credible, and in whose manner there was nothing to shake their confidence, is erroneous; because, from his connection with the parties, or the subject in controversy, and other similar circumstances, they might properly disbelieve him.

TROVER for a horse, tried at HAYWOOD, on the last circuit, before his Honor, *Judge Strange.*

The plaintiff's case was made out by the testimony of one Davis, who proved, that being about to visit the State of Tennessee, the plaintiff gave him a note for thirteen dollars, upon a person resident there, and requested him to collect, and in the event of receiving the money, to buy for him, the plaintiff, a horse; the plaintiff engaging to repay to the witness any money over and above the money received, or the note, which the horse might cost; that he, the witness, received the amount due upon the note, and purchased a horse, at the price of fifty dollars, of which he paid ten dollars in cash, and gave his own note for the balance; that he, the witness, acted throughout as the agent of the plaintiff, although he did not disclose his agency; that immediately upon his return he delivered the horse to the plaintiff, who paid him the difference in money. The horse continued in the possession of the plaintiff some time, when he was seized and sold under an execution against the witness and was purchased by the defendant. The witness Davis was proved to be involved, but was not otherwise impeached and contradicted.

His Honor instructed the jury, that if they believed the witness, the plaintiff was entitled to their verdict; and "that when a witness was heard by a jury, who was neither impeached nor contradicted, whose story was credible, and in whose manner there was nothing to shake their confidence, they were bound to believe him."

The counsel for the defendant requested his Honor to inform the jury, that an execution from a court of record bound chattels from the *teste;* but his Honor thinking the instruction irrelevant to the case, refused to give it.

(595) A verdict was returned for the plaintiff, and the defendant appealed.

Gwinn, for the defendant.
No counsel appeared for the plaintiff.

GASTON, J. To enable us to judge of the correctness of the instruction which is called in question by the appellant, it is necessary to consider it in connection with the facts in controversy, and the testimony submitted to the jury, so far as we can collect them from the very compendious statement spread upon the record. The plaintiff claimed the horse in question, as having been purchased by him, through the agency of his witness Davis, while the defendant set up title thereto under a purchase at execution sale, as the property of the said Davis. We must understand, then, that the main question in dispute was, whether the original purchase was made by the witness for himself, or as the agent of the plaintiff. His testimony was positive, that he bought for the plaintiff, and he was not contradicted by opposing testimony, nor was his credit assailed, as having given a different account of the transaction, or as being a man of bad character. But there were circumstances attending the case, indicating a connection of the witness with the parties and with the subject-matter, which, the appellant insisted, impaired the credit due to his testimony. One of the parties was his alleged principal, and the other represented his judgment creditor. He was shown to be "involved." When he made the purchase, he did not disclose his agency, according to his own statement. He paid an inconsiderable part of the price with money which he had collected for the plaintiff, and gave his own note for the residue; and when he delivered the horse to the plaintiff he was repaid the amount for which he had made himself personally liable. The weight of these circumstances might depend much on the degree of the witness's embarrassment, whether it reached insolvency, or but slightly affected his pecuniary credit; also on the fact whether the execution upon which the horse was sold, or any other execution, was or was not hanging over him, at
(596) the time of the purchase or delivery of the horse; and also in the mode in which he was repaid for the

advance of his credit, whether in money or in property, or in the discharge of an existing debt. Of the weight of these circumstances, we have neither the means nor the authority to judge; but we cannot avoid seeing that they were circumstances fit to be considered and weighed by the jury.

The Judge charged, that if the witness was believed, the plaintiff was entitled to a verdict. The propriety of this part of the charge cannot be questioned. His Honor *then* instructed the jury, "that when a witness was heard by a jury, who was neither impeached nor contradicted, whose story was credible, and in whose manner there was nothing to shake confidence, they were bound to believe him." Our difficulty lies in ascertaining from this language, what was the real *information* communicated to and received by the jury. The term "credible," as applied to a witness, has a legal and well-defined meaning: it means, deserving of confidence. But as applied to a "story," it may signify worthy of belief, or probable, only, or barely not incredible. It was not used by his Honor in the first sense, as it would be absurd and indecent to suppose that the jury were instructed that they were bound to believe what they found worthy of their belief. We can scarcely understand it to have been used in the second sense, as there was no reason to doubt, but that they would believe what had been testified by any witness, which had not been shown to be untrue, and which also appeared to them to be probable. A rule was laid down *by the Court* for the guidance *of the jury,* on the only material question, whether the witness should be believed or not; and we apprehend that by men of plain sense it would be understood as importing, that *in law,* they were obliged to find a verdict conformable to his testimony, as he had not been impeached or contradicted, unless his story was incredible, or his manner of testifying exceptionable. We are the more inclined to adopt this construction because of the refusal to give the instruction prayed for as to the lien of the *fieri facias.* If the circumstances before referred to were of *any* importance, then *probably* (we cannot say *positively,* for the teste of the execution in question is not set (597) forth in the case) the instruction prayed for was relevant, as tending to show the pressure on the witness at the time of the transaction; but if they were utterly disregarded—

if in law they could not operate against his positive, unimpeached and uncontradictory testimony, then clearly an inquiry into the lien of the executions was altogether irrelevant.

Thus understanding the instructions, we are of opinion that it is erroneous. The circumstances before referred to may have weakened or destroyed the confidence of the jury in the veracity of the witness. Whether they ought to have this effect, it was for them and them only to decide. They are the competent and exclusive judges whether human testimony be inconsistent with the operation of those common principles which regulate human conduct. If thus believing, they do not in their consciences actually assent to it, there is no rule of law which compels them to yield to it an official faith. While the competency of witnesses and the relevancy of testimony are made the exclusive subjects of judicial cognizance, the credit of witnesses and the sufficiency of their testimony are as exclusively matters for the determination of the jury. Thus it was by the common law. But it is, if possible, more emphatically so under the statute, which declares it "unlawful for a Judge, in delivering a charge to the petit jury, to give an opinion whether a fact be fully or sufficiently proved, *such matters being the true office and province of the jury.*"

It is possible, notwithstanding our endeavors to ascertain the precise meaning of the charge, that we have misunderstood it. We have often cause to lament that the "statements" which accompany our transcripts are rather rapid sketches than full representations of what occurred below, and of what we are called upon to revise. Extreme brevity can scarcely fail to produce obscurity.

The judgment of the Superior Court of Haywood is to be reversed, with instructions to award a new trial.

PER CURIAM. Judgment reversed.

Cited: S. v. Rash, 34 N. C., 387; *S. v. Smallwood,* 75 N. C., 105; *S. v. Jenkins,* 85 N. C., 546; *Fry v. Currie,* 91 N. C., 442.

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ACCORD AND SATISFACTION.

1. A plea of accord and satisfaction must aver an acceptance by the plaintiff of the thing agreed to be given in satisfaction. *Bank v. Littlejohn*, 565.

2. A parol agreement cannot be received to support a plea of an accord, to an action of debt upon a bond. *Ibid.*, 566.

ACCOUNT. See "Evidence," 1.

ACTS OF THE LEGISLATURE.

1. Acts of the Legislature are presumed to be constitutional; and where in the Court below the validity of an act was drawn in question, and the judgment was in support of it, and the case stated no facts from which the contrary could be inferred, the judgment must be affirmed. *Neal v. Roberts*, 81.

2. An act making it an indictable offense to fell timber in the channel of a particular creek, in a particular county, is a public law, and need not be recited in an indictment on it. *State v. Cobb*, 115.

3. Words of reference, as "such persons," or "the persons so offending," shall be implied in an act creating a small misdemeanor, if the context shows that such is clearly its meaning. *Ibid.*, 118.

4. Where different objects of policy may have dictated an act creating an indictable offense, none of which, however, are expressed, it shall not be construed with reference to one of the objects only. *Ibid.*, 118.

5. A statute is conclusive as to all public facts which it recites. *Kello v. Maget*, 421.

ADMINISTRATION, LETTERS OF.

1. An entry on the records of the County Court, "It is ordered that S. G. be appointed administrator of J. G. on his entering into bond in the sum of $4,000, with J. B. and W. S. securities," is a valid grant of administration, although it be not stated on the record that the administrator gave bond, and was properly qualified. *Spencer v. Cohoon*, 27.

2. The want of such statement may render the grant defective, and authorize the County Court to annul it; but until that is done, the grant must be respected as valid by other courts. *Ibid.*, 27.

3. Letters of administration, reciting the probate of a will and the death of the executor, are substantially letters *de bonis non*, although not expressly stated so to be. *White v. White*, 265.

See "Appeal," 1.

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ADMINISTRATORS. See "Executors and Administrators."

AMENDMENT.

1. All amendments made either by consent or leave of the Court, ought to appear on the record. *Shearin v. Neville*, 4.

2. The Superior Court may amend the record of its proceedings at any time during the same term, and may thus obviate any objections made to the record of that term. *State v. Calhoon*, 374.

See "Record," 2; "Removal of a Cause," 1.

ANSWER IN EQUITY. See "Practice."

APPEAL.

1. Upon an appeal from an order of the County Court, granting letters of administration, the Superior Court acquires general jurisdiction of the matter, and may grant letters to one not originally a party to the contest. *Blunt v. Moore*, 10.

2. Discharging a rule to show cause why a new trial should not be granted is not a judgment from which an appeal can be taken. *State v. Osborne*, 114.

3. An appeal may be taken from an order of the County Court granting a re-probate. Such an order comes within the meaning of the Act of 1777, allowing appeals. *Harvey v. Smith*, 190.

4. Where the dissatisfied party neglects to appeal from such a sentence, it is not regularly re-examinable in the superior tribunal. *Ibid.*, 190.

5. The word "appeal" in sec. 9, Act of 1794 (Rev., ch. 414), is not used in its technical sense, and it is not therefore necessary or regular for the magistrate to pass upon a claim of a third person to property attached, before such person can carry his case to the County Court. *Simpson v. Harry*, 202.

6. The sixth and seventh sections of the Act of 1818 (Rev., ch. 963), modified by the Act of 1824 (Tay. Rev., ch. 1234), respecting the time which the transcript of the record in appeals from the Superior to the Supreme Court shall be filed in the latter, do not apply to appeals in criminal cases. *State v. Dickinson*, 349.

7. An appeal lies from a judgment of the Superior Court, ordering a postmaster to be fined for not serving as a juror. *State v. Williams*, 372.

8. The Supreme Court, upon an appeal, cannot consider of any objections to the record of the Court below that do not appear in the transcript sent up. *State v. Calhoon*, 374.

9. An appeal lies to the Supreme Court from all acts of the Superior Court professing to be final adjudications on questions of right, notwithstanding such adjudications may be irregular and void. *Darden v. Maget*, 498.

See "Indictment," 6; "Will," 3.

APPRENTICE. See "Covenant," 7; "Evidence," 16.

ARBITRATION AND AWARD.

Where a submission to arbitration was by parol, and the award of the arbitrators was also unwritten, it was not error in the Judge to leave it to the jury to decide upon the testimony what was the true question submitted, and what was the real question decided in the award, and then to instruct them what would be the law, according as their finding might be the one way or the other. *Torrence v. Graham*, 284.

ASSIGNMENT.

An assignment, like any other conveyance, may take effect by estoppel between parties and privies, and thus legally operate to transfer the estate of the assignor, although he was not in possession when the assignment was made. *Gwyn v. Wellborn*, 319.

See "Assumpsit."

ASSUMPSIT.

Where a person assigned his distributive share in an estate, and afterwards collected and used the amount due upon it, assumpsit will not lie against him at the instance of the assignee. *Smith v. Gray*, 42.

ATTACHMENT.

1. The claim of an interpleader to property attached must be a *legal* claim; a mere *equitable* one will not entitle the interpleader to the property attached. *Simpson v. Harry*, 202.

2. No claim can be interposed by a third person to a *debt* attached in the hands of a garnishee, as nothing but *tangible* property comes within the words or the spirit of the law allowing an interplea. *Ib.*, 202.

3. No attachment can be levied upon property held by, or debts due to, absconding debtors as *trustees* for others. *Ib.*, 206.

4. Creditors of garnishees have no *legal* right to interpose for preventing such garnishees from confessing themselves indebted to the absconding debtor. Such confession will not affect their claim against the garnishee. *Ib.*, 207.

5. But where specific property is levied upon, as the property of an absconding debtor, claimants have a right to interpose for the purpose of protecting their present enjoyment of it, and for preventing any injury that might attend its removal. *Ib.*, 207.

6. Where attachments were issued and a garnishee summoned, at the instance of different creditors and at the same term of the Court, judgments were obtained against the garnishee in each case for the sum due by him to the attached debtor and executions issuing thereon against the garnishee tested of the same term were put into the hands of the same sheriff, the money collected by the sheriff must be applied to the exe-

ATTACHMENT—*Continued.*

cutions *pro rata*, without regard to the priority of time in issuing the attachments and summoning the garnishees. *Freeman v. Grist*, 217.

See "Appeal," 5.

BASTARDY.

1. The Act of 1799 (Rev., ch. 531, sec. 3), which authorizes a summary remedy against the reputed father of a bastard child, is not a repeal of the common-law right of suing all or either of the obligors on the bastardy bond; and in suits on such bond the notice required by that act need not be shown. *Shew v. Stewart*, 412.

2. The summary remedy prescribed by this act is only cumulative, and applies only as against the reputed father and not as against his securities on the bastardy bond. *Ibid.*, 412.

BEQUEST.

1. A bequest to a son of "every article I have already possessed him with," will not by the mere force of those words pass a slave which the testator erroneously supposed he had emancipated, and had placed with the son for protection only; and in such case, whether it was the testator's intention to pass the slave, is a question of fact. *White v. White*, 268.

2. Where a testator bequeathed certain slaves to the children of his daughter, and expressed his wish that his son-in-law should not have the "use or control of the said slaves," and then subjoined "but if she survives him, then my said daughter *may have the use* of said slaves during her widowhood," it was *held*, that the daughter did not take a *legal* estate in the slaves upon which an action at law could be sustained, but that her interest was only an equitable one, and could be protected only in a court of equity. *Bennett v. Williamson*, 282.

3. A bequest by a testator to his wife of a "girl named Hannah and my horses, etc., and my plantation, with all the land adjoining to it, during her lifetime," passes but a life estate in the negro girl. *Black v. Ray*, 334.

4. A direction that the testator's infant grandchildren shall be "raised" and "educated," creates a charge upon the estate for such raising and education during their minority. *Cloud v. Martin*, 399.

5. Where a testator bequeathed a female slave "to his wife during her natural life or widowhood," and in a subsequent clause of his will provided that the slave should become the property "of my daughters A and B at their mother's death, *or* at the time that my son Thomas arrives at sixteen years of age; and her increase, if any, before that time, to be equally divided amongst the rest of my children. If the widowhood of my wife should terminate before her natural life, Nell shall remain in this place for the support of my children who may live here": It was *held*, that the increase

BEQUEST—*Continued.*

born after the arrival of Thomas to the age of sixteen years, but before the death of the widow, would belong after the death of the widow to A and B; particularly as that construction would harmonize with the rest of the will, which seemed to aim at an equal distribution of the testator's property among all his children. *Gibbons v. Dunn*, 446.

6. The state of the testator's family at the time of making his will may be attended to in settling its construction. *Ibid.*, 449.

7. The whole will may be examined, and the state of the property looked at, if it appears on the face of the will; not *de hors*, unless to explain a latent ambiguity. *Ibid.*, 450.

See "Legacy," 2.

BOND.

Where A owed B by bond, and it was agreed between them that A should pay the debt by installments, and execute a new bond for the balance due after each payment: It was *held*, that an offer of performance by A was not a bar to an action on a bond delivered after the agreement was made. *Bank v. Littlejohn*, 563.

BOUNDARY.

1. Where a call in a grant was "running N. 45 degrees W. 220 poles to a black-oak near his (the grantee's) own line," and the black-oak could not be found, nor its locality proved: It was *held*, that the word *near* would not carry the line 30 poles further, to reach another tract of the grantee's, but that it must be stopped at the end of the distance mentioned in the grant. *Harry v. Graham*, 76.

2. A posterior line of a grant will never be reversed for the purpose of showing the termination of a prior one, unless the description of the posterior be more specific than that of the prior, and unless from the posterior a mistake in the prior can be clearly shown. *Ibid.*, 76.

3. In questions of boundary, a plat or map of an adjoining tract of land, made at the instance of the owner, is evidence as the act of the owner against him, and all persons claiming the same land under him, though it is not conclusive, and may be explained. *Webb v. Hall*, 278.

4. The meaning of a deed as to what land it covers is a question of law to be decided by the Court. *What* are the *termini* of the lines are points of construction, *where they are* questions of fact. Therefore, it was *held*, to be error for the Judge to instruct the jury that where there was an irreconcilable difference between a natural boundary and a marked line, it was matter of evidence, and not of construction. *Hurley v. Morgan*, 425.

5. As a general rule, in questions of boundary a natural object has a preference over marked lines on corners, and will control them when the natural object is of such a nature as can-

BOUNDARY—*Continued.*

not easily be mistaken by the parties, either in name or situation, as in the case of a river or a creek. But the reason of this rule does not apply to very small streams, which either have no names or formerly had a different name from that which they now bear. With respect to these, it is open to evidence *which stream* the parties meant by a particular name, and the jury, if satisfied of the fact, from proof of possession or the like, may find a stream to be the one meant, although not the one bearing the name mentioned in the deed. *Ibid.*, 425.

6. In locating a grant, a call for the lines of another person ought to control the course and distance, when at the time of the survey these lines were well established; but if they never were marked, or if there has been no possession according to them, then a call for them should be disregarded, and the course and distance pursued. *Carson v. Burnett*, 558.

BUNCOMBE TURNPIKE COMPANY.

1. That clause of the charter of the Buncombe Turnpike Company (Act of 1824, Tay. Rev., ch. 1258, sec. 13), which compels all persons living within two miles of the road of said company, and who are by law liable to work on public roads, to perform six days labor on the said road in each and every year, is not unconstitutional, inasmuch as they are by the same charter exempted from paying tolls for passing over the road. *Turnpike Co. v. McCarson*, 306.

2. Whether a person subject to pay toll could be constitutionally compelled to pay toll—*quære? Ibid.*, 306.

3. The board of directors of the Buncombe Turnpike Company may, under its charter, appoint a manager, or overseer of the repairs of the road, without a deed under the corporate seal; and this appointment may be shown by the production of their books, containing an entry of a resolution to that effect. *Ibid.*, 306.

CASE STATED.

1. The case stated for the Supreme Court by the Court below will always be presumed to be correct in point of fact, unless from an examination of the whole record a mistake clearly appears. *Harry v. Graham*, 76.

2. Records of suits not referred to as making any part of the case sent to the Supreme Court, cannot be noticed by it. *Freeman v. Grist*, 219.

3. Where it does not appear in a case that a person of the same name is the same person, this Court can presume it to be so. *Gwyn v. Wellborn*, 320.

4. An exception on the case stated for an appeal to the Supreme Court is there taken to be absolutely true as to all matters which occur on the trial or purport to have been acted in the court from which the appeal comes. But where the fact

CASE STATED—*Continued.*

is stated as having occurred in another court, the record of that court is the only competent evidence of the fact, and no statement contrary to it can be admitted. *State v. Reid*, 377.

See "Evidence," 24.

CERTIORARI. See "Record," 3, 5, 6.

CHEROKEE INDIANS.

1. Under the third article of the Treaty of 1819, between the United States and the Cherokee Indians, the particular Indians residing within the limits of North Carolina to whom reservations in fee simple were made had a right to alienate the tracts reserved as they thought proper, prior to, and independent of, any act of the State Legislature. *Belk v. Love*, 65.

2. The condition annexed to the reservations under this article does not require a perpetual residence on the tracts reserved, but only a notification of an *intent* to reside, which is a condition precedent; and when complied with, the estate becomes absolute. *Ibid.*, 65.

3. But if this were otherwise, an individual could not treat the estate as at an end before the State shall enforce a forfeiture for the breach of the condition. *Ibid.*, 65.

CLERK.

1. Where a person had been elected Clerk of the Superior Court, under the Act of 1832, ch. 2, and at the proper time had tendered his bonds, which had been accepted by the Court, and he inducted into office, while the former clerk was present in court, cognizant of what was going on, and did not object thereto, but actually surrendered up the office and records to the new clerk in term time, and retired from the performance of the duties of the office for twelve months thereafter: it was *held*, that such conduct in the old clerk amounted to a surrender of his office to the Court, and justified the reception and induction into office of the newly elected clerk. *Williams v. Somers*, 61.

2. Where a clerk elected prior to the Act of 1832, ch. 2, during good behavior, was in court, when a person elected under that act was admitted as clerk, and made no objections to the Court against such admission, but surrendered the books and papers to the new clerk, and likewise neglected to tender his bonds, which he was bound by law to renew at that term: it was *held*, that such conduct amounted to an abandonment of the office, and justified the admission of the new clerk. *Dickens v. Justices*, 406.

COLOR OF TITLE.

To constitute color of title there must be some written document of title *professing* to pass the land which is not so obviously defective that it could not have misled a man of ordinary capacity. Hence, a sheriff's return of a sale upon a *fi. fa.*

COLOR OF TITLE—*Continued.*

is not color of title, for that is not understood by any man of ordinary capacity as either passing or professing to pass a title. *Dobson v. Murphy*, 586.

See "Sheriff's Deed," 2.

COMMON CARRIER.

The rule of diligence which measures the liability of common bailees for hire is not that by which the engagements of common carriers is to be tested. The latter can be excused for the non-performance of their contracts by nothing short of the act of God, or of the public enemy. *Harrel v. Owens*, 273.

CONDITION.

A condition or limitation annexed to an estate destroys the *whole* of the estate to which it is annexed, and a *part* only of it. *Bennett v. Williamson*, 283.

See "Cherokee Indians," 2, 3.

CONSIDERATION.

Where a specific consideration is set forth in a conveyance, and no others are referred to in general terms, none other than the specific one can be averred and proved. But if one consideration is specified, and others are referred to in general terms, it is competent to show them forth in evidence; and where the deed is wholly silent as to the consideration, proof of the actual consideration is admissible. *Jones v. Sasser*, 452.

See "Frauds, Statute of," 1.

CONSPIRACY.

A private person can obtain redress for a conspiracy only when it operates to his injury, and when as to him its object is unlawful. *Eason v. Petway*, 47.

CONSTITUTIONAL LAW. See "Acts of the Legislature," 1; "Buncombe Turnpike Company," 1, 2; "Postmaster"; "Taxes," 2.

CORPORATION.

1. The books of a corporation, containing entries, in accordance with its charter, when identified, are admissible to prove the organization and existence of the corporation. *Turnpike Co. v. McCarson*, 306.

2. When a corporation is plaintiff, it must, upon the general issue, show itself to be a corporation. And when the charter is by statute, that is done by showing the statute, and that the persons acting under color of it are in possession of the corporate franchises. *Ibid.*, 309.

3. The non-existence of a corporation acting as such, or the forfeiture of its charter, can only be adjudged at the suit of the

CORPORATION—*Continued.*

sovereign. Such non-existence or forfeiture cannot, when there is no judicial sentence against it declaring it null, be collaterally inquired into by individuals. *Ibid.*, 309.

4. Corporations by prescription, or by letters patent, could, according to the old books, act only by deed. In modern times, however, it has been held that although they can grant only by deed, yet they may do many other acts without one, as *appoint a bailiff*, or the like. *Ibid.*, 310.

5. But corporations, created by legislative charter, which allows or requires the ordinary business to be done, not by the corporation as an entire body, but by a select board as the agents of the corporation, are not governed by the old rules of the common law in their mode of action, but are guided and regulated by the statute creating them. *Ibid.*, 310.

6. The agents of a corporation are not required by any rule of the common law to act by deed on behalf of their principals, where they might act for themselves by part. *Ibid.*, 311.

COSTS.

1. Under the Acts of 1790 (Rev., ch. 326) and 1798 (Rev., ch. 504, sec. 3), persons who appear in court and act as parties defendants may, in case the petitioner succeeds, be adjudged to pay costs, though they have not regularly made themselves parties by a rule of Court. *Jones v. Physioc*, 173.

2. If the petitioner under these acts procures subpœnas and copies of his petition to be served on the persons to be notified, it must be at his own costs, as they are not required to be made parties by the petitioner. *Ibid.*, 173.

3. Where the proceedings under a writ of *mandamus* are dismissed, the relator may be ordered to pay the costs. *Dickens v. Justices*, 406.

4. Although costs are not expressly given by any act of the Assembly organizing the Supreme Court, yet the power of giving a judgment for them necessarily results from the several Acts of 1810 (Rev., ch. 785, sec. 7), 1818 (Rev., ch. 963, secs. 6 and 7), and 1825 (Taylor's Rev., ch. 1282). *Sparks v. Woods*, 489.

5. An *ex-parte* proceeding, upon which no judgment can be given affecting others, is not comprehended in the term "action," as used in sec. 90 of the Act of 1777 (Rev., ch. 115), and upon an appeal to the Supreme Court, from an irregular judgment of the Court below, by a person not a party to the proceeding, the Court may, in its discretion, adjudge that neither party to the appeal shall pay costs. *Darden v. Maget*, 498.

COVENANT.

1. A covenant for quiet enjoyment runs with the land, and one who is evicted may recover upon such covenant in the deed of any prior vendor, and this whether he purchased with or without warranty. *Markland v. Crump*, 94.

COVENANT—*Continued.*

2. An intermediate vendor cannot, in respect of his liability upon his covenant for quiet enjoyment, recover of a prior vendor, but must first make good the damages of the person evicted. *Ibid.*, 94.

3. The right of a vendor who sells with warranty, to retain the title papers, does not give him the right to sue primarily for the eviction of his vendee. *Ibid.*, 98.

4. Privity of contract will not alone suffice to sustain an action upon a covenant running with land, but the plaintiff must show a damage to himself in particular from the breach alleged. *Ibid.*, 101.

5. Upon a covenant to pay sixty dollars annually for two years, for the hire of a slave, and also to furnish the slave with food, etc., *debt* may be brought before a single justice for one years' hire; and if the warrant call for that sum due by bond, it is well supported by the production of the covenant. *Hamilton v. McCarty*, 226.

6. Where a party incurs an obligation by his own act, he will be bound to the extent of his engagement, and will not be excused for its non-performance by accident from inevitable necessity, as he would be if the obligation were imposed upon him by law. And for the breach of such voluntary engagement the extent of the injury forms the proper measure of damages, however the performance may have been defeated. *Clancy v. Overman*, 402.

7. If the owner of a slave binds him as apprentice, and covenants that he shall faithfully serve his master, etc., and the master covenants to teach the apprentice a trade, these covenants are mutual and independent, and a breach on one side is no bar to an action for a breach on the other. *Ibid.*, 402.

8. A covenant to teach an apprentice, or cause him to be taught, a trade, is not an absolute engagement that he shall, at all events, learn that trade, but is only a covenant for faithful, diligent and skilful instruction. *Ibid.*, 402.

DAMAGES. See "Covenant," 6; "Detinue," 2; "Mills," *passim;* "Sheriff," 1, 2; "Trespass," 2, 3; "Widow," 3.

DEBT. See "Payment and Satisfaction."

DECLARATIONS OR ADMISSIONS. See "Evidence," 1, 8, 13, 14, 15, 16.

DECEIT.

Where the defendant in an execution fraudulently induces the sheriff to sell unsound property of his, and at the sale fraudulently represents it to be sound, an action for a deceit lies against him by the purchaser. *Erwin v. Greenlee*, 39.

DEED.

1. Where the subject-matter of a conveyance is completely identified by its name, by its localities, and by certain other

DEED—*Continued.*

marks of description, the addition of another particular which does not apply to it, nor to anything else, will not avoid the conveyance, but will be rejected as having been inserted through misapprehension or inadvertence. *Belk v. Love*, 65.

2. A party who insists on a trial that a particular deed vests the title in him is not thereby precluded, either by way of estoppel or presumption, from contending that another deed is to be presumed in his favor. *Hurley v. Morgan*, 432.

3. A deed may properly, and in many cases ought, to be found upon presumption, although the jury and Court may be satisfied it never was in fact made; and the Court may instruct the jury that it is their duty to presume such deed, unless the contrary be proved. *Ibid.*, 432.

4. General words in a deed, as "my estate," or "all the property I possess," do not pass or profess to pass anything which was not held by the grantor as his own property, although he might have the possession. *Jones v. Sasser*, 463.

5. The Court cannot assume as a fact that property, the title to which is in one person and the possession in another, is held adversely, and upon the faith of that fact declare the property to be included in a general description used by the person in possession of "all my property." *Ibid.*, 463.

See "Consideration"; "Evidence," 3, 4.

DEPOSITION. See "Evidence," 6.

DETINUE.

1. In detinue, if after action brought and issue joined, the plaintiff gets possession of the thing sued for, that fact may be pleaded *puis darrein continuance*, in abatement of the suit; but *it seems* that it would not be a good plea in bar. *Morgan v. Cone*, 234.

2. In detinue, damages are only consequential upon the recovery of the thing sued for; and therefore, if the plaintiff, pending the suit, obtains possession of it, he cannot proceed for the damages, but his suit fails altogether. *Ibid.*, 234.

3. If, upon a judgment in detinue for slaves, the execution is satisfied by the payment of the assessed value by the defendant, and its receipt by the plaintiff, the title to the property will be transferred to the defendant by relation to the time of the verdict and judgment; and the issue born of said slaves, between the rendition of the judgment and the satisfaction of the execution, will of consequence belong to him. *Vines v. Brownrigg*, 239.

4. The form and effect of the judgment and execution in detinue, stated by DANIEL, J. *Ibid.*, 239.

DISTRIBUTIVE SHARE.

See "Assumpsit."

DOWER.

See "Widow," 2, 3, 4, 7.

EJECTMENT.

1. Ejectment may be sustained, although it appears that the lessor of the plaintiff and the defendant are both living on different parts of the tract of land in dispute, claiming adversely to each other. *Dobbins v. Stephens*, 5.

2. When a landlord makes himself defendant, to protect the possession of his tenant, the plaintiff cannot on the trial prove other trespasses committed by the landlord himself. *Carson v. Burnett*, 560.

EMANCIPATION. See "Bequest"; "Slaves," *passim.*

EQUITY OF REDEMPTION. See "Execution," 3, 4, 5, 6, 7, 8.

ESTOPPEL.

1. A person who has title to a slave will not be estopped by reason of any concealment or misrepresentation of that title, from setting it up against one who claims as a volunteer. *Jones v. Sasser*, 452.

2. The title to slaves cannot be transferred without consideration, by virtue of an estoppel arising from the misrepresentations of the owner, as that would be in contravention of the Act of 1806 (Rev., ch. 701), which requires gifts of slaves to be in writing; and an estoppel cannot be set up to defeat the statute. *Ibid.*, 452.

3. The doctrine of legal and equitable estoppel partially discussed by GASTON, J. *Ibid.*, 452.

See "Assignment"; "Deed," 2.

EVIDENCE.

1. The declarations of a party must be taken altogether, as well those to discharge as to charge him; and where a person to whom an account had been presented did not object to any of the items, but only contended for further credits, what he says must be submitted to the jury along with the evidence of his admissions arising from his silence as to the items. *Walker v. Fentress*, 17.

2. The acts of a court can be proved only by its own records, and parol proof for that purpose is inadmissible. *Spencer v. Cohoon*, 28.

3. A registered copy of a deed cannot be received as evidence of title, without accounting for the absence of the original. *Smith v. Wilson*, 40.

4. The affidavit of a party to the cause, proving the loss of a paper, will be received to let in secondary evidence of its contents. *Ibid.*, 41.

EVIDENCE—*Continued.*

5. Proof of particular facts is not admissible to impeach a witness, and the opinion of an impeaching witness is proper only when it coincides with the general reputation of the person impeached; and a witness who swears that he did not believe another to be honest, but who does not know the opinion of others, is incompetent. *Downey v. Murphey*, 84.

6. A party offering a deposition is not bound to read a statement of irrelevant facts contained in it; neither can the other party read it for the purpose of contradicting it. *Ibid.*, 85.

7. It seems that an inhabitant of a town may be a witness for the town, where he has no distinct individual interest in the suit; and where the subject-matter of the controversy is a public charity belonging to the town, he is undoubtedly competent. *Jackson v. Comrs.*, 177.

8. Where it is inferable from facts before proved that the wife is acting as agent of her husband, evidence of her acts or declarations is admissible. *Torrence v. Graham*, 286.

9. A witness who releases a particular interest which he has in an estate, is competent, where it does not appear that he has any other. *Ibid.*, 286.

10. Where it appears from the case stated that a note was in the possession of the plaintiff, and was not produced on the trial, every fair presumption that can arise from withholding it is to be made against him, as to those parts of the contents that do not appear from the evidence given. *Symington v. McLin*, 298.

11. Where a demand was read aloud from a written paper, any person who heard it may prove the demand, without the production of the paper from which it was read. *Black v. Ray*, 334.

12. Where a fraudulent attempt to prevent competition at a sale is alleged against a party, he may, in answer to evidence of such allegation, show that he requested several persons to attend the sale, and bid, as in such case his declarations became a part of the *res gestæ*. *Jones v. Young*, 355.

13. If, in answer to the *prima facie* evidence of fraud, arising from the possession retained by a debtor, after a conveyance, of his slaves, his assignee produces proof tending to show that the debtor's possession was *bona fide*, as his bailee or agent, the creditor may give in evidence to rebut such proof the acts and declarations of the debtor, showing that he claimed the slaves as his own after his conveyance. *Askew v. Reynolds*, 367.

14. Where a person, alleging himself to be the agent of another, sold a note payable to his principal for the benefit of his principal, what he said to the purchaser at the time of the sale, as to the note belonging to his principal and his being merely an agent, is admissible evidence. *Ibid.*, 367.

15. Generally the acts and declarations of a grantor, after his grant, cannot be received in evidence against his grantee.

EVIDENCE—*Continued.*

But where the grantor remains in possession after his grant, his acts and declarations as to his possession will be admitted upon the same principle that permits the declarations of a trader at the time of leaving his residence to be admitted as evidence of the purpose of his departure; and that, on a question of adverse possession, receives the acts and declarations of the tenant, to show the nature of his possession. *Ibid.*, 370.

16. The acts and declarations of a slave apprentice is evidence on the part of the master in an action by the owner to show the temper and disposition of the apprentice. *Clancy v. Overman*, 402.

17. When a witness is called upon to prove facts originally entrusted to memory, he may use a written memorandum, which he has formerly made, in order to refresh his memory; but if, after such help, he cannot recollect a particular fact, the writing is not admissible to supply it. This rule, however, does not apply to proof of written instruments or documents; for where such are lost or destroyed, so that they cannot be produced, a copy of them, verified in court by the copyist to have been taken from the original, is admissible, even in preference to a professed full recollection of their contents by the witness, because such a copy is less liable to error than the memory of the witness. And so, for the same reason, an *abstract* of the original, taken and verified in the same way, is admissible, independent of the recollection of the witness, and even in preference to it, as to the facts which it contains. *Kello v. Maget*, 414.

18. To impeach the credibility of a witness, by proving that he swore differently as to a particular fact on a former trial, it is not necessary that the impeaching witness should be able to state all that the impeached witness then deposed. It is sufficient if he is able to prove the repugnancy as to the particular fact with regard to which it is alleged to exist. *Ingram v. Watkins*, 442.

19. The fact of a witness being interested in the matter in dispute must be shown only in the mode in which other controverted facts are to be proved. Therefore, the declarations of the witness, not on oath nor in the presence of the party against whom they are offered, with respect to his interest in the subject-matter of the suit, cannot be given in evidence. *Ibid.*, 442.

20. A witness will not be admitted to prove what a deceased witness swore to on a former trial, unless he can state substantially *all* the testimony of such deceased witness. *Ibid.*, 444.

21. Where a son, to whom the father had conveyed a slave by deed of gift, but retained the possession by permission of the son, was alleged to have stood by while his father was making another voluntary disposition of his property by deed among all his children, and to have fraudulently concealed or misrepresented his title: it was *held*, that a private conversation which occurred between the father and the son just before

EVIDENCE—*Continued.*

the execution of the latter deed, in which the father assured the son that by becoming a party to it his right under the deed of gift would not be prejudiced, was admissible to show that the son himself was misled, and that it was admissible also to prove how the father held the slave. *Jones v. Sasser*, 452.

22. A mere trustee, who has no direct interest in the event of the suit, is competent to testify in that suit. *Ibid.*, 452.

23. A memorandum signed by a deputy sheriff, setting forth that he had, at the request of the sheriff, sold a certain tract of land at a particular time, upon a certain execution, is not admissible as evidence of the sale nor of any other fact, unless he is dead. But upon a question whether the sheriff's deed, purporting to be executed in pursuance of such sale, was fraudulent, it may be admitted for the purpose of showing merely upon what information the sheriff proceeded to execute a deed for land which he had not himself sold. *Dobson v. Murphy*, 586.

24. Where testimony, competent for one purpose but not for another, was, after being objected to, admitted, but no instruction as to its effects was prayed for, and it did not appear for what purpose it was used, it was *held*, that its reception alone could not be assigned for error. *Ibid.*, 590.

25. Instruction to a jury, that they were bound to believe a witness who was uncontradicted and unimpeached, whose story was credible and in whose manner there was nothing to shake their confidence, is erroneous: because from its connection with the parties, or the subject in controversy, and other similar circumstances, they might properly disbelieve him. *Noland v. McCracken*, 594.

See "Boundary," 3; "Buncombe Turnpike Company," 3; "Corporation," 1, 2; "New Trial," 3; "Perjury"; "Warranty."

EXECUTION.

1. A sheriff is not bound, independent of the Act of 1826, ch. 31, to levy an execution, and raise the money upon the property of the principal debtor, in preference to that of the surety. And if he even combines with a third person to throw the debt upon the surety, when he might have made it out of the principal, he does not thereby render himself liable to the action of the surety. *Eason v. Petway*, 44.

2. As to a sheriff, all the defendants in an execution are principals, and he may levy upon which, and in what proportion he pleases. *Ibid.*, 46.

3. A sale of the equity of redemption, under an execution at law, at the instance of the mortgagee, for his mortgage debt, is not sanctioned by the Act of 1812 (Rev., ch. 830). The words of that act are general, but this exception arises necessarily out of the subject and the spirit of the act. *Camp v. Coxe*, 52.

4. Whether the act would justify a sale by the mortgagee for any other debt—*quære? Ibid.*, 52.

EXECUTION—*Continued.*

5. The nature of the interest sold is not changed by the 2d or 3d section of the Act of 1812. The rights of the parties remain as before, equitable; therefore, the statute is to receive its proper construction from a court of equity. *Ibid.*, 54.

6. Whenever a sale under a *fi. fa.* cannot have the effect to satisfy the plaintiff, the *fi. fa.* can confer no power to sell. *Ibid.*, 55.

7. The object of the Act of 1812 was to make the mortgaged estate available to the other creditors of the mortgagor; not to affect the relation between him and the mortgagee. *Ibid.*, 57.

8. As courts of equity relieve against agreements between persons in a fiduciary relation, so they ought to prevent the mortgagee from purchasing the equity of redemption at execution sale, and thereby destroying the relation between him and the mortgagor, created by the contract of loan. *Ibid.*, 59.

9. Growing crops are the proper subjects of a levy and immediate sale under a *fi. fa.*, and the purchaser acquires a right of ingress and egress, to cut and carry them away when ripe. *Smith v. Tritt*, 241.

10. A sale under an execution, of a growing crop, made at the distance of two miles from the place where the crop stands, is void, and passes no title to the purchaser. *Ibid.*, 241.

11. After an execution sale of unripe growing grain, it is *in custodia legis* till it ripens, when the purchaser has a reasonable time to cut and carry it away. *Ibid.*, 242.

12. The law always requires the presence of personal chattels in sales under execution. *Ibid.*, 243.

13. Land cannot be sold under a *fi. fa.* which issues and bears *teste*, after the death of the debtor, without bringing in the heirs by *scire facias;* and this, although the *fi. fa.* may be an *alias*, the original of which issued and bore *teste* in the lifetime of the debtor. *Wood v. Harrison*, 356.

14. The Act of 1828, ch. 12, sec. 1, which enacts that a justice's execution shall bind personal property only from its levy, was passed for the protection of purchasers from the defendant in the execution only; and therefore, if the defendant dies after the *teste* of an execution, but before its *levy*, his administrator is bound thereby, and the goods in his hands may be levied upon and sold without a *scire facias* to revive the judgment. *McCarson v. Richardson*, 561.

15. According to the English rule, a vendee under the sheriff, when a stranger to the suit, in which the execution issues, is not obliged to show a judgment, but only the execution; but if the vendee be the plaintiff in the suit, he must also show a judgment. But in this State a purchaser at an execution sale must show a judgment as well as an execution; and if the execution be not warranted by the judgment, the sale will not avail to pass the title. *Dobson v. Murphy*, 586.

See "Deceit"; "Forcible Entry and Detainer," 2, 3; "Fraud," 4, 5; "Sheriff," 1, 2; "Sheriff's Deed," 2.

EXECUTORS AND ADMINISTRATORS.

1. If an administrator marries the next of kin of his intestate, and has assets, and upon the death of his wife, administer upon her estate, her distributive share becomes his property, the claim being by the mere operation of law satisfied and extinguished. And in such case it seems that the wife's share would become the property of the husband without an administration on her estate. *Dozier v. Sanderlin*, 246.

2. Where an intestate is indebted to the wife of his administrator, and the latter has assets, the debt is satisfied by the mere operation of law, and does not survive to the wife. *Ibid.*, 246.

3. Whether the debt of the intestate be due to the husband or to the wife, and whether the one or the other be the representative, the doctrine of retainer applies, and the debt is extinguished. *Ibid.*, 249.

4. The assent of an executor to a life-estate in a slave extends no further than such life-interest, and the revision remains in the executor, when he may assert after the death of the life-owner. *Black v. Ray*, 334.

5. Where a testator devised that his "executors" should sell his lands, and appointed three persons executors, only one of whom qualified and acted as executor, a sale by that one alone will, under the statute of 21 Hen. VIII., ch. 4, be sufficient to pass the estate, without its appearing that the others either have *renounced* the executorship or *refused* to join in the sale. *Wood v. Sparks*, 389.

6. The probate of the will, and the qualification of the executors in the spiritual court, is not necessary to the valid execution of a power over lands conferred on the executors by the will. *Ibid.*, 393.

7. Nor does a renunciation of the office of executors deprive them of the right to execute the power, unless the power was given to them simply *as executors*. *Ibid.*, 393.

8. A forbearance to enter upon the duties of executor when the will is proved is presumptive evidence of a *refusal* to accept the trust. *Ibid.*, 396.

9. But if an executor actually *renounces* of record, he may still come forward, qualify and enter upon the execution of the functions of his office. *Ibid.*, 396.

10. A court of law will not entertain a suit against an executor or administrator with the will annexed, for the non-performance or improper execution of a discretionary power given in the will. *Therefore*, where a testator directed that his grandson should be "raised" and "taken care of," and "educated at the direction and care of" his son James, it was *held*, that an action could not be maintained on the bond of the administrators with the will annexed for the expenses of such education, though the son James was also one of the administrators. *Cloud v. Martin*, 397.

11. Whether a legatee can sue on the bond of an administrator with the will annexed, for a legacy to which the administrator has assented—*quœre?* *Ibid.*, 399.

EXECUTORS AND ADMINISTRATORS—*Continued.*

12. An application to the County Court by an executor, for an order appointing commissioners to divide the estate of his testator among the legatees, without any proceeding to make those legatees parties, is merely *ex-parte*, and will not authorize the Court to enter judgment of confirmation so as to bind the legatees, nor to make an order that such of the legatees as came in voluntarily and opposed the confirmation of the report shall pay the costs. *Darden v. Maget*, 498.

See "Administration, Letters of."

FACTOR.

1. It *seems* that the construction to be put upon written instructions from a principal to his factor is to be determined by the Court and not by the jury. *Symington v. McLin*, 291.

2. Where a factor sold the goods of his principal, together with some of his own, and took in payment for the whole a promissory note made by another person, payable to himself, it was *held*, that the purchaser was discharged, and that therefore the factor became himself responsible for the price of the goods. And the Court seemed inclined to think that either circumstance, of taking the note of the third person or blending the claims of the principal and factor in the same note, if, in the latter case, it had been the note of the purchaser himself, would have been sufficient to create the responsibility in the factor. *Ibid.*, 291.

3. Where, in addition to the circumstances stated above, it appeared that the factor concealed from his principal the fact of his having taken the note, and represented the purchaser as alone bound for the price of the goods, much more will he be held responsible. *Ibid.*, 291.

4. The rights of principals, and the correspondent duties and obligations of factors, stated and elaborately discussed and explained by RUFFIN, C. J. *Ibid.*, 291.

5. A general power to a factor to sell implies a power to do so in the usual way, at the place where the sale is to be made. *Ibid.*, 295.

6. A direction to "sell for the best price" means no more than the law enjoins where the principal is silent. *Ibid.*, 295.

7. A direction to "sell immediately" is not violated by a delay of fifteen days, where nothing is proved as to the state of the market. *Ibid.*, 295.

FEME COVERT, DEED OF.

1. Where it did not appear, either in the order for a commission to take the private examination of a *feme covert*, under the Act of 1751 (Rev., ch. 50), or in the commission itself, that she was an inhabitant of another country, or so aged or infirm as to be unable to travel to court, it was *held*, that the deed was inoperative to convey the wife's interest in the land. *Fenner v. Jasper*, 34.

FEME COVERT, DEED OF—*Continued.*

2. It seems that it must appear that the commission and the certificate of the commissioners were returned to the Court, approved and ordered to be registered, or the deed will be invalid as to the wife's estate in the land. *Ibid.*, 34.

3. A certificate of commissioners appointed in another State to take the private examination of a *feme covert*, touching the free and voluntary execution of her deed, which states merely that she "acknowledged the same to be her act and deed *in due form*," is not a compliance with the Act of 1810 (Rev., ch. 791), which requires a certificate of her acknowledgment that she executed the deed freely, and "doth voluntarily assent thereto." *Lucas v. Cobbs*, 228.

4. An order that a deed of a *feme covert*, with the accompanying commission and certificates, be registered, is not conclusive that all the requirements of the statute have been complied with; and the omission of all or any of them may be shown when the deed is offered in evidence upon any trial. *Ibid.*, 228.

5. The deed of a *feme covert* is void at common law, and can only be effectual when taken according to the Acts of 1715 and 1751 (Rev., ch. 3 and 50). By those acts the deed is to be first proved as to both husband and wife, and then her private examination is to be had either by a Judge or in the County Court; and when her examination preceded the probate the deed was held to be inoperative. *Sutton v. Sutton*, 582.

6. Either a Judge out of court, or the County Court in session, may, upon being satisfied of the wife's inability to attend for privy examination, issue a commission to take it. *Ibid.*, 585.

FORCIBLE ENTRY AND DETAINER.

1. Whether an indictment will lie at the common law, for a forcible detainer after a peaceable entry—*quære?* But it is certain that neither by the common law nor under the statutes can it be maintained, where the entry is both peaceable and lawful. *State v. Johnson*, 324.

2. A purchaser of land under execution may enter peaceably and retain possession, although some of the last tenant's goods remain on the premises. *Ibid.*, 325.

3. He may in such case even break open an outer door of a house. *Ibid.*, 326.

4. An *action* for the mere injury to the house or land, cannot be maintained against one who has has a right of entry, for entering by *force*. But he may be indicted for the forcible entry, on account of the breach of the peace. *Ibid.*, 326.

5. The entry, to authorize summary proceedings under the Stat. 8 Hen. VI., must be an *unlawful entry*, followed by a forcible detainer, and so stated in the inquisition, or it will be quashed. *Ibid.*, 326.

FORNICATION AND ADULTERY. See "Indictment," 12.

FORTHCOMING BOND.

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be satified; and therefore, if a surety to the forthcoming bond, before it is forfeited, discharges the execution without the request of his principal, such surety cannot maintain an action against his principal for money expended for the latter's use, although by the payment of the money in satisfaction of the execution the bond was discharged. *Gray v. Bowles*, 437.

FRAUD.

1. Fraud in the execution of a deed may be averred at law, but fraud in the consideration can only be relieved in equity. *Logan v. Simmons*, 16.

2. An allegation of fraud against a purchaser at execution sale will not be heard from a stranger to the execution. *Harry v. Graham*, 76.

3. A voluntary conveyance made by a debtor, who owned at that time, and left at his death, sufficient property to pay all the debts which he owed at the time of such conveyance, is not necessarily fraudulent and void as to creditors. *Jones v. Young*, 352.

4. The question of fraud in preventing competition at an execution sale cannot arise between the alleged fraudulent purchaser at such sale and a claimant under a prior voluntary conveyance from the debtor. *Ibid.*, 354.

5. If the defendant in an execution places money in the hands of another person for the purpose of purchasing his own property, at a sale under the execution, with an intent to defraud his creditors, and that person buys it, and takes a deed from the sheriff, the defendant is still the owner of it, and another of his judgment creditors may, at law, subject it to the satisfaction of his debt, although the first execution be for a *bona fide* debt, and the sheriff who sold under it is not a party to the fraudulent contrivance of the debtor. *Dobson v. Erwin*, 569.

6. Different jurisdictions at law and in equity for the suppression of fraud, stated by RUFFIN, C. J. *Ibid.*, 569.

See "Deceit"; "Husband and Wife," 1; "Mills," 1; "Possession," 6; "Purchaser"; "Widow," 7.

FRAUDS, STATUTE OF.

1. The Act of 1819 (Rev., ch. 1019), "to make void parol contracts for the sale of lands and slaves," does not require that the consideration of the contract should be set forth in the written memorandum of it. *Miller v. Irvine*, 103.

2. There is a material difference between the statute of 1784, avoiding conveyances as to the widow, and that of 1715, avoiding them as to creditors and purchasers; in the former, *voluntary conveyances* are not fraudulent, simply on account of their being *voluntary*. *Littleton v. Littleton*, 331.

FRAUDS, STATUTE OF—*Continued.*

3. There must be an actual intent to defraud the wife of her dower, to avoid a conveyance under the Act of 1784. *Ibid.*, 331.

4. Any conveyance, in which the husband reserves to himself the property during his life, is necessarily but colorable, and therefore void as to the widow, under the Act of 1784. *Ibid.*, 332.

5. So of any other case in which the apparent immediate disposition is not *bona fide*—is not intended to interfere with the present enjoyment of the husband, but only to hinder that of the widow. *Ibid.*, 332.

6. Under the statute of 13 Eliz. a conveyance made with a view to becoming indebted is as much fraudulent, as one made by a person already indebted. The reasons upon which this rule is founded, apply equally to conveyances made before and after marriage, under the Act of 1784, where the intent is to defeat the dower of the widow. Indeed, the word "widow," used in the Act of 1784, makes the case more strong; for that word is not more appropriate to the living woman whom the donor married than to her whom he intends to marry. *Ibid.*, 333.

GIFT.

1. Where a controversy turns upon the question whether certain slaves, which were put into the possession of a daughter upon her marriage, were intended as a gift or a loan, and there was no written evidence of the transaction, and no precise *formula* was stated by any witness to have been used in it, it is not erroneous in the Judge to leave the case to the jury to decide upon all the evidence, whether a gift or a loan was intended. *Torrence v. Graham*, 284.

2. What construction the law would place upon a *loan* expressly declared to be for life—*quœre?* *Ibid.*, 289.

3. Where one made a parol gift of slaves to his son-in-law, and the latter, by direction of the former, gave them by his will to the grandchildren of the donor, it was *held*, that this did not constitute a gift in writing, within the Act of 1806 (Rev., ch. 701), and that the donor might, after the death of his son-in-law, resume the possession of them. *Bennett v. Flowers*, 467.

4. Where one, upon the marriage of his daughter, made a parol gift of slaves to her husband, who died, leaving two infant daughters, and appointed the donor executor executor of his will and guardian of his children, to whom he bequeathed the slaves, it was *held*, that the donor might, under the Act of 1806 (Rev., ch. 701), resume the possession of them, although he had proved the will, hired them out as guardian, during the minority of the legatees, and upon their marriage, had procured a division to be made, and delivered the share of each in severalty. *Hamlin v. Alston*, 479.

See "Estoppel," 2; "Possession," 5, 6, 7.

GRANT.

1. The rule that a grant cannot be presumed from one who is forbidden by law to make it, applies only where the person is forbidden under all circumstances from making it. Therefore, where the commissioners of a town were required to set apart a lot for a school, and it appeared that they had done so, yet a grant of that lot to an individual might be presumed, as the grant might have been made before the selection took place, or the first might have been given up, and another selection afterwards made. *Jackson v. Comrs.*, 177.

2. If the Judge leaves it to the jury to presume a deed, from length of possession and other circumstances, without stating particularly the weight which the law attaches to each circumstance, as tending to establish or rebut the presumption, it is not erroneous, unless such particular instructions be prayed and refused. *Ibid.*, 177.

3. The Acts of 1777 (Rev., ch. 14, sec. 11) and 1783 (Rev., ch. 185, sec. 14), which require grants to be recorded in the Secretary's office, do not impose upon the grantee the burden of showing affirmatively that it has been done. The non-recording, if an available objection at all, must be shown by him who makes it. But *it seems* that such an objection is not available at all. *Van Pelt v. Pugh*, 210.

4. Slight and immaterial mistakes in the recording of a grant will not avoid it. *Ibid.*, 210.

See "Costs," 1, 2.

GROWING CROPS. See "Execution," 10, 11.

GUARDIAN.

1. Guardian bonds being taken by public authority, have a high character of authenticity, and need not be verified by the ordinary tests of truth, applied to merely private instruments, namely, the obligation of an oath and the cross-examination of witnesses; therefore, where the execution of such bonds, taken from their proper repository, is denied by plea, it is only necessary to prove the identity of the defendant in order to sustain the affirmative of the issue. *Kello v. Maget*, 414.

2. Where the fact that a guardian was appointed, is admitted, a presumption arises that a guardian bond was given, since such a bond is made a prerequisite to the appointment. *Ibid.*, 421.

3. Where the sureties of a guardian obtain, under the Act of 1762 (Rev., ch. 69, sec. 21), an order for counter security, and at that time the guardian owes his ward, and never afterwards either returns an account nor makes a payment, no presumption of satisfaction at that, or any subsequent time, arises from his then being able to pay the sum he owed; and the sureties to the first bond were liable for it, although the order for counter security expressly releases them. *Foye v. Bell*, 475.

GUARDIAN BOND. See "Guardian"; "Hertford County Act," 2.

HERTFORD COUNTY ACT.

1. The summary proceedings authorized by the Act of 1830, ch. 68, for the relief of persons likely to be injured by the burning of the records of Hertford County, partake of the nature of proceedings in equity; and the rules of equity practice should, therefore, when applicable, govern them. *Kello v. Maget*, 414.

2. In proceedings under this act, to recover upon a guardian bond it is sufficient to show that a guardian bond was given, with a penalty large enough to cover the amount claimed, and that it was executed by the defendant, without showing the names of the justices to whom it was made payable or the exact amount of the penalty of the bond. *Ibid.*, 414.

HOTCH-POT.

Gifts of personalty by a husband to children, whether those of his present wife, or by a former marriage, are to be brought into hotch-pot for the benefit of the wife, she being placed in this respect upon the same footing with children not fully advanced. *Littleton v. Littleton*, 329.

HUSBAND AND WIFE.

1. A conveyance by a woman before marriage is not at law, under any circumstances, a fraud upon the marital rights of her husband. *Logan v. Simmons*, 13.

2. Slaves loaned to a woman before marriage will be held by her husband as bailee, and the statutes of limitation will not operate upon his possession until the contract of bailment is at an end. *Ibid.*, 13.

3. The husband is not by marriage the purchaser of his wife's chattels. Marriage is the only contract between the parties; the law gives the husband his wife's goods as an incident. *Ibid.*, 15.

4. What the wife has disposed of before marriage is not hers, and is not, therefore, transferred to the husband. *Ibid.*, 15.

5. An ante-nuptial voluntary bond or contract may, in some cases, be relieved against in equity. *Ibid.*, 16.

See "Evidence," 8; "Executors and Administrators," 1, 2, 3.

INDICTMENT.

1. An indictment for biting off the ear, under the second section of the Act of 1791 (Rev., ch. 339), must state the offense to be done *on purpose* as well as unlawfully. *State v. Ormond*, 119.

2. To render an act indictable as a nuisance it is necessary that it should be an offense so inconvenient and troublesome as to annoy the whole community, and not merely particular persons. Therefore, where it was charged that the defendants assembled at a public place and profanely and with a loud voice cursed, swore and quarreled, in the hearing of divers persons then and there assembled, whereby a certain singing

INDICTMENT—*Continued.*

school was broken up and disturbed, *ad commune nocumentum*, it was *held*, that the indictment could not be sustained as one for a common nuisance. *State v. Baldwin*, 195

3. An indictment which states no unlawful purpose and sets forth no act which the defendants assembled to commit, cannot be one for an unlawful assembly. *Ibid.*, 195.

4. Nor is one which charges no act of violence, or an act fitted to inspire terror, nor any attempt to commit an act of violence which, if committed, would make the defendants rioters, an indictment for a riot or a rout. *Ibid.*, 195.

5. The power to quash an indictment before the defendant pleads is purely a discretionary one. It is not usually exercised, unless where the defect is gross and apparent, not where the offense is of a heinous nature. *Ibid.*, 196.

6. Upon an appeal from a judgment of *cassetur* this Court will not revise the exercise of the power to quash, but decide upon the sufficiency of the indictment, as it would appear upon a demurrer, motion in arrest of judgment, or writ of error. *Ibid.*, 196.

7. If the facts charged must, from their very nature have created a nuisance to the citizens in general, the words *ad commune nocumentum* may be omitted. If the facts charged show an offense inconvenient and troublesome, that *may* have extended its annoyance to the community, or may have reached only certain individuals of that community, those words become indispensable. *Ibid.*, 197.

8. An indictment under the Act of 1826, ch. 13, charging that the defendant, on a particular day, and on divers other days before that day, sold and delivered spirits to certain slaves whose names were to the jurors unknown, is defective for uncertainty, in embracing the transactions of divers days with divers persons. And as the names of the slaves were not given, it is also defective for not stating the owners of the slaves or averring that the owners were unknown, if the fact were so. *State v. Blythe*, 199.

9. *Semble*, that a slave may be described by his name alone, but it is better for the name of his owner to be given also. *Ibid.*, 201.

10. Where the name of a slave is averred to be unknown, the name of his owner or an averment that he also is unknown, is essential. *Ibid.*, 202.

11. An indictment which charges an indecent and scandalous exposure of the naked person to *public view in a public place* is sufficient, without charging the act to have been committed in the presence of one or more citizens of the State. *State v. Roper*, 208.

12. An indictment for fornication, under the Act of 1805 (Rev., ch. 684), must charge a fact to negative the relationship of marriage between the parties, or it cannot be sustained. *State v. Dickinson*, 349.

INDICTMENT—*Continued.*

13. *It seems* that the signing the name of the foreman to the endorsement of a "true bill," on a bill of indictment, though a salutary practice, is not essential to its validity. But whether this be so or not, a variance between the name of the foreman, as appearing upon the record of his appointment, and his signature upon the bill, is immaterial, for his identity must necessarily be known to the Court, and the receiving and recording the bill with his endorsement establishes it. *State v. Calhoon*, 374.

14. Where an indictment charged in effect that the defendant, a constable, falsely affirmed that a note for the payment of money was a forthcoming bond, and that by means of such falsehood the defendant deceitfully prevailed on the prosecutor to execute a promissory note for the payment of a sum of money: it was *held*, that the charge was too vague and uncertain in not stating how the result was produced by the falsehood practiced. *State v. Fitzgerald*, 408.

15. Legal terms in an indictment must be understood in their legal sense, unless by other sufficient and plain words another meaning is impressed upon them. *Ibid.*, 410.

16. It is a general rule in indictments that "the special manner" of the whole fact ought to be set forth with such certainty that it may judicially appear to the Court that the indictors have not gone on insufficient premises. *Ibid.*, 411.

See "Forcible Entry and Detainer," 1, 4.

INJUNCTION BOND.

An action of debt may be maintained upon an injunction bond, notwithstanding the summary remedy given by the Acts of 1785 (Rev., ch. 233, sec. 2) and 1810 (Rev., ch. 794). *Casey v. Giles*, 1.

INSOLVENT DEBTOR.

1. A defendant who has given bond under the Act of 1822, ch. 3, for the relief of insolvent debtors, cannot object to the informality of the bond, and pray a discharge on account thereof. *Page v. Winningham*, 113.

2. When this Court affirms the judgment of the Superior Court, ordering a defendant in *ca. sa.* to be imprisoned, it directs a *procedendo* to the Court below to carry the judgment into effect. *Ibid.*, 113.

JUDGE'S CHARGE.

1. Where the general doctrines and rules contained in a Judge's charge are correct, and there appears no special circumstances requiring a modification of them, and the party excepting has called for no special instructions which have been denied, an exception to the charge cannot be sustained. *McRae v. Evans*, 243.

2. Where the defense of a person indicted for murder, as disclosed by his witnesses, consists of a justification, and the Judge in

JUDGE'S CHARGE—*Continued.*

his charge takes it for granted that the homicide was committed by him, he does not thereby violate the Act of 1796 (Rev., ch. 452) forbidding the expression of his opinion as to the weight of evidence, because the justification necessarily admits the homicide, and its validity cannot be examined except upon the supposition that it was committed by him who seeks to justify it. *State v. Miller*, 500.

3. An assumption by a Judge in his charge that a fact deposed to is true, but which, if true, cannot prejudice the prisoner, is not erroneous. *Ibid.*, 504.

See "Arbitration and Award"; "Evidence," 25; "New Trial," 1, 2.

JUDGMENT.

1. If it appears upon the whole record that the demand of the plaintiff is against the defendant in his representative character, a judgment against him personally will be reversed. *Shearin v. Neville*, 3.

2. A judgment merely that the report of commissioners to divide land "be confirmed" without ordering it to be recorded, and giving judgment for the costs, *it seems*, is an interlocutory and not a final judgment. *Nicelar v. Barbick*, 259.

3. A judgment is conclusive between parties and privies, as to those facts only which it directly establishes, but does not prove those which may be inferred from it. As in trespass *quare clausum fregit*, unless entered upon the plea of *liberum tenementum*, it is not even admissible in another action, between the same parties, or their privies, to prove title to the *locus in quo*. *Bennett v. Holmes*, 486.

See "Mills," 7, 8, 10, 14.

JURY. See "New Trial," 4, 5, 6; "Postmaster."

JUSTICES' JURISDICTION. See "Covenant," 5.

LANDLORD AND TENANT. See "Ejectment," 2.

LAND. See "Execution," 13; "Executors and Administrators," 5; "Partition."

LEGACY.

1. An assent to a legacy by the executor may be presumed from the possession of it by the legatee. *White v. White*, 268.

2. A bequest by a testator to his wife in the following words, "I wish her to get Stanford in her third of the property, if she chooses," is not a specific legacy of the slave to the wife, but only gives her the right to take him at a fair valuation; and if that valuation is more than her share, she must account for the surplus. *Young v. Carson*, 360.

See "Executors and Administrators," 11, 12.

LIMITATIONS, STATUTE OF.

1. The possession of slaves for more than three years, by the trustees of a religious society, for its benefit exclusively, and against the rights of all others, is a bar to an action of detinue for the slaves, notwithstanding the society considers slavery as sinful and holds the slaves for the purpose of giving them the advantages of freemen; because the cause of action arose from the conversion, and not from the intent with which it was made. *White v. White*, 260.

2. Where A, tenant in fee simple, mortgaged his land for a term of 500 years, and conveyed his reversion in trust for himself for life, and afterwards for his daughters, and died; and during the continuance of the mortgage term, B got possession of the premises, and retained it for more than seven years under color of title; and afterwards the daughters, the *cestui que trusts* of the reversion, obtained the possession, and the legal representative of the mortgagee made a release to them of the mortgage term: it was *held*, that the daughters having only an *equitable* estate in the reversion, the release could not operate as a legal extinguishment of the term, but at most could only be, *at law*, an assignment of the term; that this term was barred by the statute of limitations, and that consequently the daughters could not defend their possession against an ejectment brought by those claiming under B. *Gwyn v. Wellborn*, 313.

3. But although a tenant for years may be barred by the statute of limitations, yet the reversioner will not be affected thereby until the expiration or extinguishment of the term; therefore, if in the case stated above the representative of the mortgagee had received satisfaction from the trustee, and surrendered the term to him, he, or his *cestui que trusts* holding for him, would have become entitled to the legal possession of the land, and might have defended it against the ejectment. *Ibid.*, 313.

4. The mere existence of disconnected and opposing demands, between two parties, one of which demands is of recent date, will not take a case out of the statute of limitations. There must be mutual running accounts having reference to each other, between the parties, for an item within time to have that effect. *Green v. Caldcleugh*, 320.

See "Husband and Wife," 2; "Possession," 1, 7, 8; "Widow," 2.

MANDAMUS. See "Costs," 3.

MANSLAUGHTER.

1. If a slave, in defense of his life, and under circumstances strongly calculated to excite his passions of terror and resentment, kills his overseer, the homicide is by such circumstances mitigated to manslaughter. *State v. Will*, 121.

2. *It seems* that the law would be the same with respect to killing a master or temporary owner, under similar circumstances. *Ibid.*, 121.

MANSLAUGHTER—*Continued.*

3. If an apprentice flies from the chastisement of his master, who pursues him with unlawful violence, and in the pursuit is killed, the apprentice is not guilty of murder. *Ibid.*, 165.

4. So of a person guilty of a misdemeanor, flying from an officer. *Ibid.*, 165.

5. Unconditional submission is the general *duty* of the slave. Unlimited power is, in general, the *legal* right of the master; but this does not authorize the master to kill his slave, and the slave has a right to defend his life against the unlawful attempt of his master to take it. *Ibid.*, 165.

6. If a slave *resists* his master, previous to any attempt on the part of the latter to take his life, and he afterwards kills his master, he is guilty of murder. *Ibid.*, 166.

7. It is not the criterion of a "legal provocation" that the offensive act must be an indictable offense. *Ibid.*, 169.

MILLS.

1. A conveyance made to defeat, hinder, or delay a party injured by the erection of a mill, in the recovery of his damages, is fraudulent and void as to such party, and the owner or proprietor of the mill, notwithstanding such conveyance, continues still liable for the damages. *Purcell v. McCallum*, 221.

2. *Quære*, whether damages for an injury to the plaintiff's health can be assessed under that act. *Ibid.*, 221.

3. Upon a petition filed under the Act of 1809 (Rev., ch. 773) to recover damages caused by the erection of a mill, damages may be assessed for an injury to the health of the plaintiff and his family, as well as for overflowing his land. *Gillet v. Jones*, 339.

4. If at the time of the trial of a suit upon a petition for damages under the Act of 1809, five years have elapsed since the filing of the petition, a peremptory judgment for the annual damage for five years is proper, whether such annual damages be above or below twenty dollars. *Ibid.*, 339.

5. The main object of the Act of 1809 was to restrain a malicious exercise of the common-law right to sue for a nuisance in frivolous cases. It does not create any new right to damages nor abolish any pre-existing one. It only restricts the party to a certain extent to a particular mode of recovery. *Ibid.*, 342.

6. The policy of the Act of 1809 requires its application to all injuries, of whatever character, arising from the erection of a mill. *Ibid.*, 343.

7. Upon a verdict under this act, where the annual damage is under $20, the proper judgment is for the whole damages, with a *cessat executio* for those not then payable. *Ibid.*, 345.

8. The judgment should be peremptory, and not conditional. *Ibid.*, 346.

MILLS—*Continued.*

9. If the damages be increased, the plaintiff will not be estopped by the judgment. If the defendant do not keep up the mill, the judgment may be set aside for the residue of the damages by *audita querula*, or other remedy in the nature of it. *Ibid.*, 346.

10. Where the suit upon the petition ends within five years, and the plaintiff has a verdict for more than $20 annual damages, he may elect to take judgment for five years damages, or only those for the years passed. And if he elects to take a judgment for five years annual damages, he will be concluded for that period, and not be at liberty to use his common-law remedy. *Ibid.*, 347.

11. It would be error as against the plaintiff, and perhaps also as against the defendant, to enter a judgment for the five years annual damages, where it exceeds $20, without the election of the plaintiff appearing upon the record, unless the suit has been protracted beyond the five years. *Ibid.*, 348.

12. One whose land is overflown by a mill-pond has a right to recover for the damages done him, notwithstanding his ancestor consented, by parol, to the erection of the dam, and the consequent overflow of the land; for if it be the grant of an incorporeal hereditament, it is void for want of a deed—if a mere authority, it can be revoked, and ceases with the life of the grantor. *Bridges v. Purcell*, 492.

MORTGAGE. See "Execution," 3, 4, 5, 6, 7, 8; "Limitations, Statute of," 2; "Possession," 4.

MURDER. See "Judge's Charge," 2; "Manslaughter."

NEW TRIAL.

1. Where no particular instructions were asked on the trial, a new trial will not be granted unless the party praying it can show that the jury was probably misled by the charge of the Judge. *Torrence v. Graham*, 284.

2. Although a party may get a verdict, notwithstanding an erroneous charge against him, on a particular point, yet if the opinion delivered may have prevented the other party relying upon, or have excluded from the case stated, other evidence that was given, a new trial will be granted. *Jones v. Young*, 352.

3. The reception of improper testimony will not be a ground for a new trial, if the only effect of such testimony can be to remove or weaken improper testimony introduced on the other side. A judgment will not be reversed for inadvertences or mistakes which *did not* and *could not* affect the rights of him who complains of them. *Ingram v. Watkins*, 442.

4. Misconduct in a juror, in a capital case, as a separation from his fellows, or eating, or drinking without the permission of the Court, before delivering the verdict, held by RUFFIN, C. J., and DANIEL, J., to be a reason for applying to the discretion

NEW TRIAL—*Continued.*

of the Judge, in the Court below, for a new trial, and not to render the verdict a nullity, and a *venire de novo* proper. *State v. Miller*, 500.

5. But, per GASTON, J., any unauthorized and unexplained separation of a juror from his fellows, in a capital case, in law, vitiates the verdict, and a *venire de novo* should be awarded. Minor irregularities are grounds for a new trial addressed to the discretion of the Judge who presided at the trial. *Ibid.*, 500.

6. The effect of a separation of the jury, before they return their verdict, and the difference between a new trial and a *venire de novo*, discussed and stated at length by RUFFIN, C. J., and GASTON, J. *Ibid.*, 500.

7. Matter alleged as a ground for a *venire de novo* should be stated on the record, and not brought forward *in pais*, as ground for a new trial. *Ibid.*, 505.

NUISANCE. See "Indictment," 2, 7.

OVERSEER.

1. The forfeiture imposed upon an overseer by the Act of 1741 (Rev., ch. 35, sec. 22), for leaving his employer's service during the time for which he was employed, does not attach to a case where, by the stipulations of the parties, the overseer may leave, or the employer may discharge him at pleasure. *Steed v. McRae*, 435.

2. A contract for services as an overseer, in which it is stipulated that the overseer may leave his employer's service, or the employer may discharge the overseer at pleasure, will be construed so as to give the overseer a *pro rata* compensation during the time he may serve. *Ibid.*, 435.

OUSTER. Vide "Possession," 11; "Reversion," 1, 2.

PARTITION.

The report of commissioners appointed to divide the lands of intestates, under the Acts of 1787 and 1801 (Rev., ch. 274 and 588) will be presumed to be correct, and be confirmed, although one dividend of *land* be nearly double and another not half of the average value of the shares, unless something improper appears on the face of the return or is shown by extrinsic proofs. *Nicolar v. Barbrick*, 257.

PAYMENT AND SATISFACTION.

If, in the case of a previous debt, the creditor, by agreement with the debtor, accepts the note of a third person, payable to himself, it is presumed to be in satisfaction, and extinguishes the original consideration. Much more when the seller agrees with the vendee, at the time of the sale, and he does then take for the price the note of such third person. *Symington v. McLin*, 298.

PEDDLERS. See "Taxes," 1, 2.

PENAL STATUTES.

It warrants upon penal statutes before a single justice, there must be some reference to the statutes which give the penalty; and the omission of such reference in the process is a substantial defect that will be fatal, even after verdict. *Turnpike Company v. McCarson*, 306.

PERJURY.

On an indictment for perjury, it is not necessary for the prosecution to prove all the evidence given by the defendant on the trial wherein he testified. It is sufficient to prove all the evidence given by the defendant in relation to the fact on which the perjury is assigned. *Ingram v. Watkins*, 445.

PLAT. See "Boundary," 3.

PLEAS AND PLEADING.

1. The Act of 1796 (Rev., ch. 451), which prevents a plea *puis darrien continuance* from being a relinquishment of the former pleas, does not subvert the order of pleading. Therefore, a plea in abatement since the last continuance necessarily operates a relinquishment of previous pleas in bar. *Morgan v. Cone*, 235.

2. Upon sustaining a plea in abatement, the judgment should be that the plaintiff's writ be quashed and that the defendant recover his costs. *Ibid.*, 238.

3. When a record from one State of our Union is declared on or pleaded in bar in another, the only proper plea or replication is *nul tiel record;* and that both as to its existence and effect is to be passed on by the Court upon inspection, and not by the jury. *Carter v. Wilson*, 362.

4. What is the effect of an entry in the record of a suit in Virginia, that "by consent of the parties it is ordered by the Court that this cause be dismissed and that the defendant pay to the plaintiff his costs, by him in this behalf expended"—*quære*. *Ibid.*, 362.

5. Whether a retraxit, any more than a nonsuit, is a bar to a future action—*quære*. *Ibid.*, 366.

6. At law, all the allegations of a plaintiff, not answered by the defendant's plea, are confessed. In equity, the charges not admitted by the answer are put in issue. *Kello v. Maget*, 419.

See "Accord and Satisfaction," 1, 2; "Corporation," 2; "Detinue," 1; "Grant," 3.

POSSESSION.

1. The cutting grass in a meadow for seven years successively, stacking it on the land, and fencing the stacks, will, with color of title, bar the entry of one claiming adversely. *Burton v. Carruth*, 2.

POSSESSION—*Continued.*

2. The doctrine of possession, as connected with the actions of trespass and ejectment, discussed by RUFFIN, C. J. *Dobbins v. Stephens*, 5.

3. To establish a presumption of title from possession, it is not necessary to prove that the possession was under a claim of right, as every possession is, unexplained, on the possessor's own right. *Jackson v. Comrs.*, 177.

4. The possession of a mortgagor, or of those claiming under him, is the possession of the mortgagee; and if the mortgagor is ousted by a stranger, and regains the possession, he regains it still as the tenant of the mortgagee. *Gwyn v. Wellborn*, 319.

5. The gift of a slave by parol, since the Act of 1806 (Rev., ch. 701), operates as a bailment; and no length of possession under such gift will raise a presumption of title in the donee. *Hill v. Hughes*, 336.

6. The possession of a son-in-law, under a parol gift from his wife's father, is not evidence of fraud in the donor as to the creditors of the son-in-law, unless there be a conveyance of the slaves by the donee, for the benefit of his creditors, which is known to the donor and acquiesced in by him. *Ibid.*, 336.

7. If the donee of a slave, under a parol gift, convey him in trust to secure creditors, but by a stipulation in the deed still retain possession, such possession is not the possession of the alienee so as to operate as a bar to the donor under the statute of limitations. *Ibid.*, 336.

8. Although the possession of part of a tract of land is in law the possession of the whole, where there is no adverse possession, yet, if the land be composed of different tracts, held under different grants, and described in the deed to the possession by different boundaries, an actual possession upon one does not in law extend to the other; and if both are covered by an elder grant, the statute of limitations perfects the title of that only on which there was an actual possession. *Carson v. Mills*, 546.

9. If part of a tract of land be covered by two titles, and he who has the better be in possession of another part of it, he has in law the possession of the whole, unless the person holding under the other title has actual possession of the interference. *Ibid.*, 552.

10. But if the person having the better title is not in the actual possession of any part of the land, and the owner of the other title is in possession outside the interference, the latter has not in law possession of the interference. *Ibid.*, 552.

11. When one is ousted, and afterwards enters and seals a deed upon the land, the entry determines the estate of the disseizor, and the deed is operative. But if he be ousted of separate parts of the land by two trespassers, and makes a deed for the whole to one of them, it does not convey the land held by the other. *Ibid.*, 554.

See "Deed," 4, 5; "Reversion," 2.

POSTMASTER.

The Act of Congress of 1825, ch. 275, sec. 35, exempting postmasters from serving on juries, is constitutional, and those officers cannot be compelled to serve as jurors on the original panel in the State courts. Though *it seems* that they would not be so exempted when called as tales jurors. *State v. Williams*, 372.

See "Appeal," 8.

POWER.

1. Courts of equity will control the unreasonable exercise by one of a power or discretion which may affect the interests of another person. *Cloud v. Martin*, 400.

2. But a court of law is bound by the terms of the will or other instrument creating the power or discretion. *Ibid.*, 401.

See "Executors and Administrators," 5, 6, 7, 10.

PRACTICE.

Where an answer in equity is evasive or insufficient, the regular course is to except to the answer and compel a full and direct one. Unless this be done, the plaintiff is under the necessity of proving every material averment in his bill which has not been admitted by the defendant, although the same amount of proof is not required, as is indispensable when the averment has been denied. *Kello v. Maget*, 419.

See "Indictment," 5, 13.

PRESUMPTION. See "Deed," 3; "Evidence," 10; "Grant," 1, 2; "Presumption," 3, 5.

PRINCIPAL. See "Factor."

PURCHASER.

A purchaser for a valuable consideration, without notice from a fraudulent grantee, acquires a good title against the creditors of the original fraudulent grantor. *Martin v. Cowles*, 29.

See "Execution," 15; "Forcible Entry and Detainer," 2, 3.

QUARE CLAUSUM FREGIT. See "Trespass," 1, 2, 4.

RECORD.

1. Upon the suggestion of a diminution of the record, the defects alleged may be supplied by sending a new transcript, or by making insertions in that before sent; and in the latter case, if the proper officer make the insertions from a memorial containing the facts omitted, it is no objection that he had not the record of the whole proceedings present. *State v. Reid*, 377.

2. The supplying defects in a transcript, either by procuring a new one or by making insertions in that already sent, is not an *amendment* of the court to which it is sent. *Ibid.*, 377.

RECORD—*Continued.*

3. When a trial is authorized on a transcript, it is presumed to give the tenor of the record; but as it may not, either party, upon a proper suggestion of a diminution of the record, may have the proceedings stayed, until a more perfect transcript be obtained. And this is usually done by a *certiorari*. *Ibid.*, 382.

4. It will be no objection that the transcript was made out from the proceeding *in paper*, instead of being taken from the *roll*, provided the transcript be a true copy of the whole record. *Ibid.*, 382.

5. A *certiorari* may issue as often as it appears to the Court that there is reason to believe the transcript is imperfect, until one is obtained to which neither can object. *Ibid.*, 382.

6. In extraordinary cases, as where two transcripts are sent *contradictory* to each other, and the parties do not agree which is correct, the Court, instead of ordering a *certiorari*, will direct the officer to attend with the original record. *Ibid.*, 383.

See "Case Stated," 1, 2, 4; "Evidence," 2; "Pleas and Pleadings," 3, 4.

RELEASE. See "Widow," 1.

REMOVAL OF A CAUSE.

1. Although one court cannot take any *posterior* action in a cause after it has been removed to another for trial, yet it may afterwards amend by supplying an omission in the record which occurred prior to the order of removal; and may then send a new transcript of the amended record to the court to which the cause was removed. *State v. Reid*, 377.

2. *It seems* that a cause cannot be removed from one Superior Court to another for trial, before issue joined. *Ibid.*, 379.

3. After a cause is effectually removed to another court for trial, the first has no further jurisdiction over it. *Ibid.*, 379.

4. If an order of removal is premature, the court to which the case is sent acquires no jurisdiction, but it remained in the court where it commenced. *Ibid.*, 379.

RENT.

A lessor who parts with the reversion cannot recover rent accruing subsequently. *Ibid.*, 100.

RETRAXIT. See "Pleas and Pleadings," 5.

REVERSION.

1. Whether the ouster of a tenant for years under the claim of a fee by a stranger is a *disseizin* of him in reversion or remainder, in this State—*quære? Gwyn v. Wellborn*, 315.

REVERSION—*Continued.*

2. But whether it be so or not, the reversioner has no right to enter on the possession until the expiration of the term for years, and until that time will not be affected by the adverse possession. *Ibid.*, 315.

See "Executors and Administrators," 4; "Limitations, Statute of," 3; "Rent."

SCIRE FACIAS. See "Execution," 13, 14.

SHERIFF.

1. If the sheriff forbears, at the request of the plaintiff, to collect money on an execution, he is not responsible therefor; but if he forbears of his accord, he will be liable for the damages the plaintiff may sustain thereby. If the whole amount of of the execution is lost by the sheriff's negligence, he will be answerable for that amount; but if the money can still be collected from the defendant in the execution (a fact which it will be for the sheriff to prove), the sheriff will be liable only for the damage which the plaintiff has sustained by the delay. *McRae v. Evans*, 243.

2. The sheriff is liable for the mere not returning an execution, but the damages therefor will be only nominal. *Ibid.*, 243.

3. Under the Act of 1782 (Rev., ch. 177, sec. 3) the sheriff must be proceeded against by *sci. fa.* as bail for not taking bail upon a *capias*, in equity; and an action on the case will not lie against him for such failure or neglect. *Troy v. Williamson*, 252.

See "Execution," 1, 2.

SHERIFF'S DEED.

1. A sheriff's deed fairly executed at any time after the sale, has relation to the sale, and operates to pass the title from that time. And if everything else be regular and fair, the law will raise no presumption of fraud against the deed merely because it may be antedated to the time of the sale. *Dobson v. Murphy*, 586.

2. If a sheriff's deed does not evidence an actual sale under execution, it cannot be connected with the execution. But if there was an execution giving the sheriff power to sell, and, if under that execution, a fair sale be made by authority of the sheriff, and the purpose of the deed is to authenticate that transaction, then it operates, from the sale, either as title or color of title. *Ibid.*, 593.

SHERIFF'S RETURN. See "Color of Title."

SHIPPER.

When the shipper agreed to load a vessel "in a reasonable time," it was *held*, that he was bound to pay for every unreasonable delay that occurred; and the fact of his residing at a distance from the shipping port made no difference in the obligation created by the articles. *Wade v. Russell*, 542.

SLANDER.

1. In an action of slander, where the words contain an imputation of murder, the plaintiff may be entitled to recover, although the defendant may prove that the person alleged to be dead is still alive, if those in whose presence the words were spoken had well-grounded reasons to believe that he was then dead. *Sugart v. Carter*, 8.

2. In actions for slander it is not admissible to prove in mitigation of damages that previous to the speaking of the words the plaintiff was in the habit of vilifying and abusing the defendant. *Goodbread v. Ledbetter*, 12.

3. To charge a man with harboring a runaway slave is not actionable, without proof of special damage, although for such offense he might, if guilty, be indicted, and, upon conviction, be fined and imprisoned. The charge, to sustain an action, must impute an offense to which is annexed an *infamous punishment*, a punishment which involves social degradation, by occasioning the loss of the *libera lex*. *Skinner v. White*, 471.

SLAVES.

1. A deed conveying slaves to the trustees of a religious society, for the use of the society, vests no beneficial interest in the trustees individually; and if it is intended to confer on the slaves the rights of freemen, while they are nominally held in bondage, it is inoperative as being against public policy. *White v. White*, 260.

2. Whether a deed of emancipation, made before the passage of the Acts of 1777 and 1799 (Rev., ch. 109 and 443), is void merely because of the incapacity of the slave to take, or because of its illegality, or whether thereby the slave was forfeited—*quære? Ibid.*, 265.

3. It seems that the slave, if he remained six months in the State, was thereby forfeited, or became derelict. *Ibid.*, 266.

4. But it seems that a reservation of the master's rights for a term of years would render the deed inoperative, because thereby the slave would be prevented from leaving the State within six months, as required by the Act of 1741. *Ibid.*, 266.

5. Whether deeds of emancipation, in opposition to the Acts of 1777 and 1779, are merely void, and the slave remains the property of the master, or whether it is forfeited to the State—*quære?* And if forfeited, whether the title of the master is divested before seizure—*quære? Ibid.*, 267.

6. A petition filed in the County Court, praying permission to emancipate a slave "at such time as the owner may think proper," and a decree of the Court granting such permission, upon the owner's "complying with the directions of the acts of the General Assembly, in such cases provided," is not a valid act of liberation, within the purview of the Acts of 1777 (Rev., ch. 109) and 1796 (Rev., ch. 453), where no other proceedings appear upon the records. *Bryan v. Wadsworth*, 384.

SLAVES—*Continued.*

7. The giving the bonds required from the owner of a liberated slave, and filing them in the County Court, forms no part of an act of emancipation, and will not aid a defective act of liberation under the Acts of 1777 and 1796. *Ibid.*, 384.

8. *It seems* that to constitute an act of liberation, entered of record under the Act of 1796, it is only necessary that there should be a petition filed making the proper allegations and expressing the desire of the owner *then* to confer freedom upon his slave, and praying permission so to do; and that the Court should, by a proper adjudication, grant the permission as prayed for. *Ibid.*, 384.

9. The manumission of a slave is the act of the owner; and although various statutes have restrained and regulated the power of the owner to emancipate, yet none have taken it from him, and conferred it upon a judicial tribunal. *Ibid.*, 386.

10. The Legislature cannot liberate a slave without the consent of his owner. *Ibid.*, 389.

See "Bequest," 1, 2, 3, 4; "Estoppel," 1, 2; "Slaves," 1, 3, 4; "Husband and Wife," 2; "Limitations, Statute of," 1; "Manslaughter," 1, 2, 5, 6.

STATUTE. See "Acts of the Legislature."

STATUTES CONSTRUED OR COMMENTED UPON.

8 Hen. VI., ch. 9. *State v. Johnson*, 326.
21 Hen VIII., ch. 4. *Wood v. Sparks*, 389.
13 Eliz., ch. 6. *Martin v. Cowles*, 32.
27 Eliz., ch. 4. *Martin v. Cowles*, 32.
1715, Rev., ch. 2, sec. 3. *Spencer v. Weston*, 213.
1715, Rev., ch. 2, sec. 4. *Burton v. Carruth*, 2.
1715, Rev., ch. 3. *Sutton v. Sutton*, 582.
1715, Rev., ch. 7, secs. 4, 5, 6. *Martin v. Cowles*, 32.
1741, Rev., ch. 35, sec. 22. *Steed v. McRae*, 435.
1751, Rev., ch. 50. *Fenner v. Jasper*, 34.
1751, Rev., ch. 50. *Sutton v. Sutton*, 582.
1762, Rev., ch. 69, sec. 21. *Foye v. Bell*, 475.
1777, Rev., ch. 109. *Bryan v. Wadsworth*, 384.
1777, Rev., ch. 114, sec. 11. *Van Pelt v. Pugh*, 210.
1777, Rev., ch. 115, sec. 57, 58. *Blunt v. Moore*, 10.
1777, Rev., ch. 115, sec. 75. *Harvey v. Smith*, 190.
1777, Rev., ch. 115, sec. 90. *Darden v. Maget*, 498.
1782, Rev., ch. 177, sec. 3. *Troy v. Williamson*, 252.
1783, Rev., ch. 185, sec. 14. *Van Pelt v. Pugh*, 210.
1784, Rev., ch. 204. *Littleton v. Littleton*, 327.
1784, Rev., ch. 225, sec. 6. *Harvey v. Smith*, 193.
1785, Rev., ch. 233, sec. 2. *Casey v. Giles*, 1.
1787, Rev., ch. 274. *Nicelar v. Barbrick*, 257.
1790, Rev., ch. 326. *Jones v. Physioc*, 173.
1794, Rev., ch. 414, sec. 9. *Simpson v. Harry*, 202.
1796, Rev., ch. 451. *Morgan v. Cone*, 235.
1796, Rev., ch. 452. *State v. Miller*, 500.
1796, Rev., ch. 453. *Bryan v. Wadsworth*, 384.

STATUTES CONSTRUED OR COMMENTED UPON—*Continued.*

1796, Rev., 469. *Murphey v. Avery*, 26.
1797, Rev., ch. 504, sec. 3. *Jones v. Physioc*, 173.
1790, Rev., ch. 531, sec. 3. *Shew v. Stewart*, 412.
1799, Rev., ch. 539. *State v. Ormond*, 119.
1801, Rev., ch. 588. *Nicelar v. Barbrick*, 257.
1805, Rev., ch. 684. *State v. Dickerson*, 349.
1806, Rev., ch. 701. *Hill v. Hughes*, 336.
1806, Rev., ch. 701. *Jones v. Susser*, 452.
1806, Rev., ch. 701. *Bennett v. Flowers*, 467.
1806, Rev., ch. 701. *Hamlin v. Alston*, 479.
1809, Rev., ch. 773. *Gillet v. Jones*, 339.
1810, Rev., ch. 785, sec. 7. *Sparks v. Wood*, 489.
1810, Rev., ch. 791. *Lucas v. Cobbs*, 228.
1810, Rev., ch. 794. *Casey v. Giles*, 1.
1812, Rev., ch. 830. *Camp v. Coxe*, 52.
1813, Rev., ch. 858. *Murphey v. Avery*, 26.
1818, Rev., ch. 963, secs. 6, 7. *State v. Dickerson*, 349.
1818, Rev., ch. 963, secs. 6, 7. *Sparks v. Wood*, 489.
1819, Rev., ch. 1019. *Miller v. Irvine*, 103.
1822, Tay. Rev., ch. 1129. *Wynne v. Wright*, 19.
1822, Tay. Rev., ch. 1131. *Page v. Winningham*, 113.
1824, Tay. Rev., ch. 1234. *State v. Dickerson*, 349.
1825, Tay. Rev., ch. 1282. *Sparks v. Wood*, 489.
1827, ch. 13. *Pettijohn v. Beasley*, 254.
1828, ch. 12, sec. 1. *McCarson v. Richardson*, 561.
1830, ch. 68. *Kello v. Maget*, 414.
1832, ch. 2. *Williams v. Somers*, 61.
1832, ch. 20. *Murphey v. Avery*, 26.

SUPREME COURT. See "Costs," 4, 5.

SURETY AND PRINCIPAL.

1. Where nothing is said or done inconsistent with that inference, if two persons put their names on paper for the accommodation of a third, they are co-securities, and are liable without respect to the apparent legal liabilities arising from the order of their names. Hence, where A procured the endorsement of B and afterwards of C, upon a note which he intended to get discounted at bank, it was *held*, that B and C were to be taken as co-sureties, although by agreement between A and B, B was to have part of the proceeds of the note discounted, for which he was to give A his own separate bond, and that agreement was not made known to C at the time of his endorsement. *Richards v. Simms*, 48.

2. A security whose obligation to pay has become absolute, by the default of his principal, may pay to the extent of his liability without suit, and the money so paid will be regarded as expended for the use and at the instance of his principal. *Gray v. Bowles*, 440.

See "Bastardy," 2; "Execution," 1, 2; "Forthcoming Bond"; "Guardian," 3.

SURRENDER.

1. Before the statute of frauds, a term of years, whether by deed or parol, might have been surrendered wholly by parol. *Gwyn v. Wellborn*, 318.

2. Surrenders are favored in law. They require no technical words, but only such as express the intention to yield up. *Ibid.*, 318.

See "Clerk," 1.

TAXES.

1. Under the Act of 1822 (Taylor's Rev., ch. 1129), a person who carries jewelry from county to county for sale is liable to the tax of twenty dollars imposed upon peddlers. *Wynne v. Wright*, 19.

2. The act imposing a tax upon itinerant dealers in jewelry is not repugnant to the Constitution of the United States, although the jewelry may have been imported from another State. *Ibid.*, 19.

TRADING WITH SLAVES. See "Indictment," 8, 9, 10.

TRANSCRIPT. See "Record"—*passim;* "Removal of a Cause."

TRESPASS.

1. In trespass *quare clausum fregit*, if the plaintiff fails to prove title to the *locus in quo* he must, to entitle him to recover, prove that the trespass was committed on lands of his, either enclosed or improved by cultivation. *Smith v. Wilson*, 40.

2. Every unauthorized intrusion into the land of another is a sufficient trespass to support an action for *breaking the close*, whether the land be actually enclosed or not. And from some damage; if nothing more, the treading down the grass or shrubbery. *Dougherty v. Stepp*, 371.

3. In the action of trespass *vi et armis*, for the destruction of or injury to chattels, the jury are not restricted in their assessment of damages to the mere pecuniary loss sustained by the plaintiff, but may award damages for the malicious conduct of the defendant, and the degree of insult with which the trespass was committed. *Duncan v. Stalcup*, 440.

4. If one enters into the possession of land under a treaty of purchase with the owner, he becomes a tenant at the will of the owner, and cannot sustain an action of trespass *quare clausum fregit* against such owner for entering upon the premises without his consent. *Walton v. File*, 567.

VENIRE DE NOVO. See "New Trial," 4, 5, 6.

WARRANTY.

Where upon the sale of a vessel, a bill of sale was executed between the parties, containing a warranty of title only, parol evidence is inadmissible to prove an additional warranty of soundness. *Pender v. Fobes*, 250.

WIDOW.

1. A release does not operate upon a mere possibility; therefore an ante-nuptial agreement, whereby the wife released all her claim as widow to the estate of her intended husband, is not, at law, a bar to her petition for a year's support. *Murphey v. Avery, admr.*, 25.

2. The claim which a widow has for dower in the lands of which her husband died seized is not, before assignment, a "right of title" to the land, within the meaning of the Act of 1715 (Rev., ch. 2, sec. 3), and is not therefore barred by the limitations of that act. *Spencer v. Weston*, 213.

3. Damages for the detention of dower cannot be claimed for a period anterior to a demand for its assignment. *Ibid.*, 213.

4. *Quære*, whether in this State dower is not necessarily assignable at law by petition only, and, therefore, that there can be no demand *in pais*. *Ibid.*, 213.

5. A widow, whose husband has left a will, to entitle herself to a year's provision under the Act of 1827, ch. 13, must enter her dissent to the will, and file her petition at the term of the County Court, when it is proved. *Pettijohn v. Beasley*, 254.

6. A County Court, having *no power* to make a year's allowance to a widow, when her petition is filed at a term subsequent to that at which the will was proved, may, on motion, set aside the proceedings granting such allowance, although the executor may also be relieved by *certiorari*. *Ibid.*, 254.

7. A conveyance of lands made by a man in contemplation of marriage, with a view of defeating his intended wife of her dower in those lands, is void as against the widow, under the Act of 1784 (Rev., ch. 204). *Littleton v. Littleton*, 327.

See "Frauds, Statute of," 2, 3, 4, 5, 6; "Hotchpot."

WILL.

1. A will written for a testator *in extremis*, by one standing in a confidential relation to him and who takes a benefit under it, is not invalid, by a conclusion of law, unless read over to the testator, or its contents otherwise proved to have been known to him. But these facts must be left to the jury, and from them fraud may be inferred, unless repelled by proof of *bona fides*. *Downey v. Murphey*, 82.

2. Where the capacity of a testator is perfect, his knowledge of the contents of his will is presumed from the fact of execution. *Ibid.*, 87.

3. When upon a petition in the County Court for repropounding an alleged will for probate, the Court ordered the same to be repropounded, and directed an issue, from the finding on which the petitioners appealed to the Superior Court; it was *held*, that the appeal carried up the whole case, and that the Superior Court had power to revise the order for repropounding the will, although the defendants had not appealed from that order. *Harvey v. Smith*, 186.

WILL—*Continued.*

4. A paper-writing alleged to be the will of a married woman, devising real estate, made under a power in a settlement, can only be supported in equity as an appointment, and cannot be propounded for probate as a will in a court of law, and all proceedings for that purpose are erroneous. *Ibid.*, 186.

5. Where a petition for repropounding a will for probate does not state between whom the issue on the first attempt to prove it was joined, nor show whether the proper persons were parties to that issue, nor whether the executor acted *bona fide*, or otherwise, so that the Court cannot see whether the petitioners were or were not bound by the finding on that issue: the petition will be dismissed as uncertain, informal and defective, but without prejudice to the rights of the petitioners to propound the same again, in a proper form before a competent tribunal. *Ibid.*, 186.

6. The Act of 1784 (Rev., ch. 225, sec. 6) does not authorize the probate of wills of married women as devises of real estate. *Ibid.*, 193.

7. It seems that a testamentary disposition of personal estate made by a married woman, with the permission of her husband, may be admitted to probate. *Ibid.*, 193.

8. Upon an issue of *devisavit vel non*, it is not absolutely necessary, as a rule of a law, to prove, besides capacity in the supposed testator, and the formal execution of the paper, the further fact, by distinct evidence, that the testator knew the contents of the instrument; for the jury may infer such knowledge from the evidence of capacity and execution. *Carr v. McCamm*, 276.

9. The next of kin has a right to have the probate of a will taken in common form recalled, and the will proved *per testes*, unless after notice of the probate he has been guilty of gross *laches*, or has acquiesced in the probate sought to be vacated; and this without making affidavit of recently discovered evidence to impeach the will; neither is the receipt of a legacy under the will, nor a claim by a bill in equity of a trust in the whole estate, an acquiescence which will bar this right. *Ralston v. Telfair*, 482.

10. If an executor, upon propounding a will for probate, cites the next of kin to see proceedings, they are barred by the probate. *Ibid.*, 484.

See "Appeal," 3, 4; "Bequest," 5, 6.

WITNESS. See "Evidence," 5, 7, 9, 17, 18, 19, 20, 22, 25.

YEAR'S PROVISION. See "Widow," 1, 5, 6.

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